d/c

प्रधान आयुक्त का कार्यालय, सीमा शुल्क, अहमदाबाद

सीमा शुल्क भवन, आल इंडीया रेडीऑ के बाजु मे, नवरंगपुरा ,अहमदाबाद 380009

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निबन्धित पावती डाक द्वारा / By SPEED POST A.D.

फा. सं./ F. No. VIII/10-64/COMMR./O&A/2019

DIN-20240371MN000000C7AD

आदेशकीतारीख/Date of Order : 28.03.2024
जारीकरनेकीतारीख/Date of Issue : 28.03.2024

द्वारापारित :- **शिव कुमार शर्मा, प्रधान आयुक्त**
Passed by :- Shiv Kumar Sharma, Principal Commissioner

मूल आदेश संख्या :

Order-In-Original No: AHM-CUSTM-000-PR.COMMR-38-2023-24 dated 28.03.2024 in the case of M/s. Hindalco Industries Ltd., Aditya Birla Centre, S.K. Ahire Marg, Worli, Mumbai 400030

1 जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

1. This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण, अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार, सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण, दुसरी मंज़िल, बहुमाली भवन , गिरिधर नगर पुल के बाजु मे, गिरिधर नगर, असारवा, अहमदाबाद-380 004 को सम्बोधित होनी चाहिए।

2. Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax

Appellate Tribunal, 2nd Floor, Bahumali Bhavan, Nr. Girdhar Nagar Bridge, Girdhar Nagar, Asarwa, *Ahmedabad* – 380004.

3. उक्त अपील प्रारुप सं. सी.ए.3 में दाखिल की जानी चाहिए। उसपर सीमा शुल्क (अपील) नियमावली, 1982 के नियम 3 के उप नियम (2) में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियों में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो, उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ (उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए)। अपील से सम्बंधित सभी दस्तावेज भी चार प्रतियों में अग्रेषित किए जाने चाहिए।

3. The Appeal should be filed in Form No. C.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Customs (Appeals) Rules, 1982. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैं, चार प्रतियों में दाखिल की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो, उसकी भी उतनी ही प्रतियाँ संलगन की जाएंगी (उनमें से कम से कम एक प्रमाणित प्रति होगी)।

4. The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

5. The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. केंद्रिय सीमा शुल्क अधिनियम,1962 की धारा 129 ऐ के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

6. The prescribed fee under the provisions of Section 129A of the Customs Act,1962 shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. इस आदेश के विरुद्ध सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण में शुल्क के 7.5% जहां शुल्क अथवा शुल्क एवं जुरमाना का विवाद है अथवा जुरमाना जहां शीर्फ जुरमाना के बारेमे विवाद है उसका भुकतान करके अपील की जा शकती है।

7. An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute".

8. न्यायालय शुल्क अधिनियम, 1870 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर उपयुक्त न्यायालय शुल्क टिकट लगा होना चाहिए।

8. The copy of this order attached therein should bear an appropriate court fee stamp as prescribed under the Court Fees Act, 1870.

Sub: Show Cause Notice No. DRI/KZU/CF/ENQ-108 (INT-09)/2018 dated 01.08.2019 issued by the Additional Director General, DRI, Kolkata to M/s. Hindalco Industries Ltd., Aditya Birla Centre, S.K. Ahire Marg, Worli, Mumbai 400030

Brief facts of the case:

Intelligence developed by the Directorate of Revenue Intelligence, Kolkata, (hereinafter referred to as DRI) to the effect that M/s HINDALCO Industries Ltd (importer), had imported various input materials without payment of duty of Customs under cover of a number of Advance Authorizations issued by regional Directorate General of Foreign Trade (hereinafter referred to as DGFT). While executing such imports, the importer availed benefit of exemption extended by notification No. 18/2015-Cus dated 01-04-2015, as amended by the Customs Notification No. 79/2017 dated 13-10-2017, and did not pay any Customs duty in the form of Integrated Goods & Service Tax (IGST) levied under Sub-section (7) of Section 3 of the Customs Tariff Act, 1975, on such input materials at the time of import. However, such exemption was extended subject to condition that the person willing to avail such benefit should comply with pre-import condition and the finished goods should be subjected to physical exports only.

2.1 Further, the intelligence developed by DRI, Kolkata, clearly indicated that although M/s HINDALCO Industries Ltd availed such exemption in respect of 05 (Five) Advance Authorizations, but while going through the process of such imports and corresponding exports towards discharge of export obligation, at no point of time the importer complied with the pre-import condition, as demanded under the said Notification No. 79/2017-Cus dated 13-10-2017, that extended such conditional exemption. Pre-import condition simply means that the goods should be imported prior to commencement of export to enable the exporter to manufacture finished goods, which could be subsequently exported under the same Advance Authorization for discharge of Export Obligation.

2.2 Accordingly, a case was booked by DRI and investigation was initiated by way of issuance of Summons under section 108 of the Customs Act, 1962. The importer was summoned for production of documents in connection with such imports and also for giving evidence. Shri Anand Mohan Mehta, S/o Late Manmohan Jain, GM-Excise & Customs of the said company appeared on 01-06-2018, and tendered his statement before the Senior Intelligence Officer of DRI, Kolkata Zonal Unit. In his statement Sri Mehta inter-alia submitted that:-

i. *He has been holding the post of GM (Excise & Customs) in M/s HINDALCO Industries Ltd (Unit-Birla Copper), and his responsibility is to take care of all the matters related to indirect taxation.*

ii. *They imported Copper Concentrates, Ammonia, Coal& Rock Phosphate. Copper Concentrate against several Bills of Entry, under Advance Authorizations. They manufacture Copper Cathodes, Continuous Cast Copper Wire Rods, Sulphuric Acid & DAP (Fertilizer) etc. In HINDALCO Industries Ltd, they are having only one unit where such Copper is manufactured, which is in Dahej, Gujarat. They imported various goods against the following 26 Bills of Entry after 13-10-2017, by availing benefit of IGST by virtue of Customs Notification No. 79/2017 dated 13-10-2017. Following are the details of 26 Bills of Entry against which such*

imports were made availing benefit of IGST under cover of 5 Advance Authorization: -

TABLE-1

Details of BE specific IGST benefit availed						
Sr. No	**Port**	**BOE No.**	**BE date**	**IGST Amount**	**AA No.**	**AA date**
1	Dahej	3771190	27-Oct-17	73482246	3410043392	17-08-2017
2	Dahej	3849563	2-Nov-17	83255975	3410043392	17-08-2017
3	Dahej	3975132	13-Nov-17	51539827	3410043392	17-08-2017
4	Dahej	4061453	113-Nov-17	63117515	3410043633	14-11-2017
5	Dahej	4064630	20-Nov-17	65464804	3410043633	14-11-2017
6	Dahej	4064707	20-Nov-17	65464806	3410043633	14-11-2017
7	Dahej	4103698	22-Nov-17	111674827	3410043633	14-11-2017
8	Dahej	4107191	22-Nov-17	52289485	3410043633	14-11-2017
9	Dahej	4107194	22-Nov-17	109957299	3410043633	14-11-2017
10	Dahej	4327391	9-Dec-17	77802118	3410043689	07-12-2017
11	Dahej	4327824	9-Dec-17	70566367	3410043689	07-12-2017
12	Dahej	4327368	9-Dec-17	64702219	3410043689	07-12-2017
13	Dahej	4327823	9-Dec-17	60994292	3410043689	07-12-2017
14	Dahej	4428140	16-Dec-17	87927148	3410043689	07-12-2017
15	Dahej	4822413	16-Jan-18	56751452	3410043689	07-12-2017
16	Dahej	4804815	15-Jan-18	86134281	3410043690	07-12-2017
17	Dahej	5084849	6-Feb-18	92772733	3410043690	07.12-2017
18	Dahej	5084848	6-Feb-18	37847254	3410043690	07-12-2017
19	Dahej	5063199	5-Feb-18	55547248	3410043690	07-12-2017
20	Dahej	5063101	5-Feb-18	55547248	3410043690	07-12-2017
21	Dahej	5138614	9-Feb-18	80496826	3410043690	07-12-2017
22	Dahej	5341625	24-Feb-18	7897930	3410043690	07-12-2017
23	Dahej	5341598	24-Feb-18	63600142	3410043691	07-12-2017
24	Dahej	5341628	24-Feb-18	66966931	3410043691	07-12-2017
25	Dahej	5508539	9-Mar-18	105938824	3410043691	07-12-2017
26	Dahej	5574608	14--Mar-18	67141990	3410043691	0712-20-17
Total				**181,48,31,788**		

iii. *It was submitted that such Bills of Entry were cleared from Dahej Port only. Till then they have calculated total amount of IGST benefit taken by them in terms of Customs notification No. 79/2017 dated 13-10-2017, stands at* ***Rs 181, 48, 31,***

788/-, which was final. ***The assessment was done provisionally and are yet to be finalized.*** *They took into consideration the individual Advance Authorization as a whole and all Bill of Entry against which IGST benefit has been availed under the respective Advance Authorizations and pre-import condition was not fulfilled. Details of Advance Authorization specific IGST Amount saved and first date of import as well as first date of export is submitted below.*

TABLE-2

AA specific IGST amount saved		
AA No.	***AA date***	***Total***
3410043392	*17-08-2017*	*20,82,78,048*
3410043633	*14-11-2017*	*46,79,68,736*
3410043689	*07-12-2017*	*41,87,43,596*
3410043690	*07-12-2017*	*41,62,43,520*
3410043691	*07-12-2017*	*30,36,47,887*
Grand Total		***181,48,81,787***

TABLE-3

AA specific No. & date of first BE and No. & date of first SB					
AA No	***AA date***	***BE No.***	***BE Date***	***SB No***	***SB Date***
3410043392	*17-08.2017*	*3657029*	*17-10-2017*	*9488531*	*25-10-2017*
3410043633	*14-11-2017*	*4061453*	*18-11-2017*	*1142123*	*25-11-2017*
3410043689	*07-12.2017*	*4327391*	*09-12-2017*	*1748183*	*23-12-2017*
3410043690	*07-12-2017*	*4804815*	*15-01-2018*	*2427404*	*25-01-2018*
3410043691	*07-12-2017*	*5341598*	*24-02-2018*	*3765720*	*26-03-2018*

iv. On being asked by the DRI officer, about the process of manufacture of Copper Cathodes from Copper Concentrates, and how much time it takes to complete the whole procedure of getting finished goods manufactured, out of the said raw materials, he submitted that to his knowledge, the process of production of Copper Cathodes takes about 22 days on an average, however, the exact period of time needed, may be confirmed only by the production people.

v. In HINDLACO, they manufacture Copper Cathodes from Copper concentrates. For this first Copper Concentrates are smelted to manufacture impure Copper Anodes (99.5% Copper). Such Anodes are then subjected to the process of refining to produce pure Electro grade copper of purity 99.99% commonly known as Copper Cathodes. [He described such process in detail, however, it was submitted that as he was not an expert in production, such process of manufacture should be confirmed from some responsible person attached to the production.]

vi. *It could be seen from the above chart that in case of all of the Advance Authorizations import was made prior to export. However, it was admitted that the said consignments imported against the five Bills of Entry mentioned in Table-3 above, i.e 3657029 dated 17-10-2017, 4061453 dated 18-11-2017, 4327391 dated 09-12-2017, 4804815 dated 19-01-2018 & 5341598 dated 24-02-2018, were received in the factory on 23-10-2017, 26-11-2017, 13-12-2017, 18-01-2018 & 02-03-2018 respectively, as evident from the copies of the GRN (Goods Receipt Notes). He submitted signed copies of such GRN as evidence for the purpose of investigation.*

vii. *Now, from the corresponding Consumption Registers maintained at the factory (electronically), it could be seen that those imported goods were put to use for the purpose of manufacture of finished goods, for the first time on 15-11-2017, which continued till 19-12-2017 for the BE No. 3657029 dated 17-10-2017. Similarly, for the BE No. 4061453 dated 18-11-2017, such goods were issued for production between the periods of 26-11-2017 to 06-12-2017. Against the BE No. 4327391 dated 09-12-2017, as per the Consumption Register, the goods were issued for production on 13-12-2017 and continued till 31-12-2017. In respect of BE No. 4804815 dated 19-01-2018, such issuance of goods for production was started on 18-01-2018 and ended on 31-01-2018. Finally, in case of BE No. 5341598 dated 24-02-2018, goods were issued for production on 04-03-2018, which continued till 31-03-2018.*

viii. *The following Chart shows the period through which such goods imported against the respective BE (Only the first BE against each Advance Authorization has been taken into consideration for the time being), were issued to the production floor/Unit. As stated, that the process of production takes about 22 days on an average, naturally, the process of production ended about three weeks later from the respective dates. It was admitted that in case of all five Advance Authorization, such goods imported against the following BEs, were not even issued to the respective production unit, when exports were made against the subject Advance Authorization. It was admitted that such export materials could not have been manufactured out of those imported materials.*

ix. *It was also admitted that in case of Advance Authorization No. 3410043691 dated 07-12-2017, the export was completed between the periods of 26-03-2018 to 31-03-2018, even before the goods were issued for the production. It was admitted that under such circumstances, it was not practicable to use the duty-free materials for production of the goods exported. He admitted that the goods exported under the respective Advance Authorizations were made out of materials, which were other than the duty-free materials imported under the respective Advance Authorization.*

Table-4

AA No	BE No.	BE Date	First date of issue of Goods	Last date of issue of goods	Date of export
3410043392	3657029	17-10-2017	15-11-2017	19-12-2017	25-10-2017
3410043633	4061453	18-11-2017	26-11-2017	06-12-2017	25-11-2017
3410043689	4327391	09-12-2017	13-12-2017	31-12-2017	23-12-2017
3410043690	4804815	15-01-2018	18-01-2018	31-01-2018	25-01-2018
3410043691	5341598	24-02-2018	04-03-2018	31-03-2018	26-03-2018

x. *Para 4.03 of the Foreign Trade Policy (2015-20) is shown to him. The said Para stipulates that under Advance Authorizations only those inputs are allowed to be imported which are physically incorporated in the export goods. Therefore, duty free goods are allowed to be imported under Advance Authorization, subject to condition that the same are used for the purpose of manufacture of finished*

goods, which are in turn exported under the same Advance Authorization. It was established that in case of the aforementioned 5 Advance Authorizations, they failed to comply with the subject condition.

xi. *For the purpose of availing the benefit of exemption from payment of IGST, one was supposed to comply with the Pre-import condition. The Pre-import condition demands that the entire materials imported under Advance Authorizations should be utilized exclusively for the purpose of manufacture of finished goods, which would be exported out of India. Therefore, it was admitted that in case goods are exported before commencement of import the Pre-import condition is violated.*

xii. *It was admitted that in case of all Advance Authorizations, as aforesaid, they made exports of goods, which were not manufactured out of the duty free materials imported under the respective Advance Authorizations. Therefore, it was admitted in case of all those consignments covered by the Bills of Entry mentioned in the Table above and the corresponding Advance Authorizations, they failed to comply with the condition of the Customs notification No. 79/2017 dated 13-10-2017.*

xiii. *Combined provisions of the Policy and the subject Customs Notification, clearly mandate, only imports under pre-import condition would be allowed with the benefit of such exemption.* ***Therefore, no such exemption can be availed, in respect of the Advance Authorizations, if the imported duty free raw materials are not utilized exclusively for the purpose of manufacture of export goods, which are exported under the same Advance Authorization.*** *It was admitted that while commencing imports against the Advance Authorizations under consideration, they failed to comply with the aforementioned conditions. They did not verify, whether the subject Advance Authorizations were compliant to pre-import conditions.*

xiv. *It was submitted that they have been importing under Advance Authorizations all along on payment of IGST, but decided to take benefit of exemption when the same was extended by the Customs Notification No. 79/2017 dated 13-10-2017. However, they should not have taken the benefit as the basic condition in respect of the exemption was not fulfilled. The benefit was availed wrongly because of incorrect interpretation of the notification. It was a bona-fide mistake.*

2.3 Another Summon was issued to the importer asking them to represent through someone responsible and involvedwith the process of production. Shri Raghavendra Adiga, S/o Shri Manjunath Adiga, Vice President (Refinery) appeared on 26-07-2018 and tendered his statement under Section 108 of the Customs Act, 1962. He was only asked to elaborate the process of manufacture and in particular to state exactly how much time is required to manufacture the finished goods, i.e Copper Cathode from the moment the input material Copper Concentrate is issued to the floor for production. In his statement Shri Adiga inter-alia submitted that:-

i. *He has been holding the post of Vice President (refinery) in M/s HINDALCO Industries Ltd (Unit-Birla Copper), and his responsibility is to take care of exclusive operation of the refinery part and production of Copper Cathodes.*

ii. *He submitted that the process of production of Copper Cathodes takes place in four phases. While the first crop is obtained within 8 days from the issue of Copper Concentrate to the Smelters, the second crop is obtained about 16 days later, and third crop is produced after about 22-23 days. As about 15% of the Copper Anode is left as the residue, which is subsequently melted to convert it into Anode, it takes about another 8 days to convert the same into Copper Cathode. So,* ***it can be inferred that to get 100% of the Copper Concentrate converted into Copper Cathode and it's by products, a period of at least 30-31 days is required.*** *Following is the process of manufacture.*

iii. *At Birla Copper there are three Smelters with two different technologies viz. Outokumpu, and Mitsubishi. Total capacity of the Smelters is 400,000 TPA. Below described is the process of Outokumpu Smelter.*

SMELTER PLANT

Smelter plant is based on use of imported copper concentrate containing about 28-30 % Copper. Here, Copper concentrate is converted into anode copper, which is suitable for further treatment in electrolytic refinery to produce copper cathodes. In the process of extraction of copper metal, Sulphuric Acid is recovered as a by-product. The major steps in copper smelting are:

- *Blending and Homogenization of concentrate.*
- *Drying of concentrate*
- *Smelting of concentrate (28-30% Cu) to produce Matte of 62% Copper.*
- *Converting: To convert liquid matte to Blister Copper*
- *Fire Refining: To Convert Blister Copper to Anode Copper*

I. Concentrate Storage and Bedding Plant

In Bedding Plant, concentrate feed is homogenised in a continuously operating circular bedding system. The bed capacity is 7000 Tones. Blending is accomplished by distributing the different concentrates in layers. Here, the concentrate coming from concentrate storage is weighed with belt scale and spread over a circular bed by horizontally rotating and vertically tilting stacker. The blended concentrate is fed by a movable reclaimer to a belt conveyor system by which it is transferred to the day bins, from where it is fed to Dryer.

II. Steam Dryer

In this section, wet concentrate mixed with Silica (6-8 %) is dried in a steam dryer. The function of the steam dryer is to dry the mixture of wet concentrates mixed with Silica Flux to a moisture of less than 0.2 % to make it suitable for flash smelting furnace.

III. Flash Smelting

In this section, dried concentrate is smelted in a flash smelting furnace (FSF) with the help of oxygen enriched air to produce matte (62 % Cu), slag and SO_2 rich flux gases. The flash smelting furnace is a U-shaped furnace. It consists of three main sections viz. Reaction Shaft, Settler, Uptake Shaft.

The Dry Concentrate from bin is fed by drag chain conveyors to a specially designed concentrate burner placed on the top of the reaction shaft, where concentrate is mixed with oxygen enriched air before feeding to the furnace. The oxygen enrichment from 60-75 %. Average feed rate is 80 TPH.

The heat for smelting is partly available from exothermic reactions and balance requirement, if any, is met by fuel oil in RS Burner. The settler portion of flash furnace is provided with low pressure air atomized oil burners distributed on all four sides. Provision of oil burner in reaction shaft is also made for initial heating up and during stoppage of furnace feeding.

Two distinct liquid phases are separated in the settler, a copper rich matte phase containing 60-62 % copper and a slag containing 1.5-2.0 % copper. Matte and slag are tapped intermittently from respective tap holes from the furnace. The temperature of matte is around 1220 °C and of slag around 1300 °C.

Part of the dust carried away with off-gases settles in the waste heat boiler and the rest being recovered in the electrostatic precipitator. The dust collected in waste heat boiler and hot electrostatic precipitator is recycled in flash smelting furnace. SO2 rich off-gas is delivered to sulphuric acid plant.

IV. Converting

There are three Pierce-Smith Converters, where matte is converted into Blister Copper. Normally two converters are hot, out of which one converter remains in operation at a time. The converting operation is basically divided in two stages, slag blow and copper blow. At the end of slag blow white metal (~ 78% Cu) and slag is produced. The slag is transferred to slag cleaning furnace for recovering Copper as matte. During Copper blow white metal is converted into Blister copper. Blister copper is transferred to Anode furnace for Fire refining.

V Anode Furnace Section

The purpose of anode furnace operation and anode casting is to produce copper anodes with chemical and physical properties required for electrolysis.

There are two anode furnaces with holding capacity of 250 T. Each is provided with two tuyers for oxidation and reduction by propane. For furnace heating, Natural gas is used.

Fire refined copper (99.5% Cu) is cast into 375 kg anodes on rotating anode cast wheel by means of automatic anode weighing and casting device.

VI. Slag Cleaning Furnace

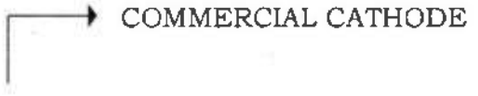
To recover the copper present in flash furnace and converter slag, these slags are treated in an Electric Furnace. The flash smelting furnace slag contains about 2 % Cu and the converter furnace slag about 5-7 % Cu.

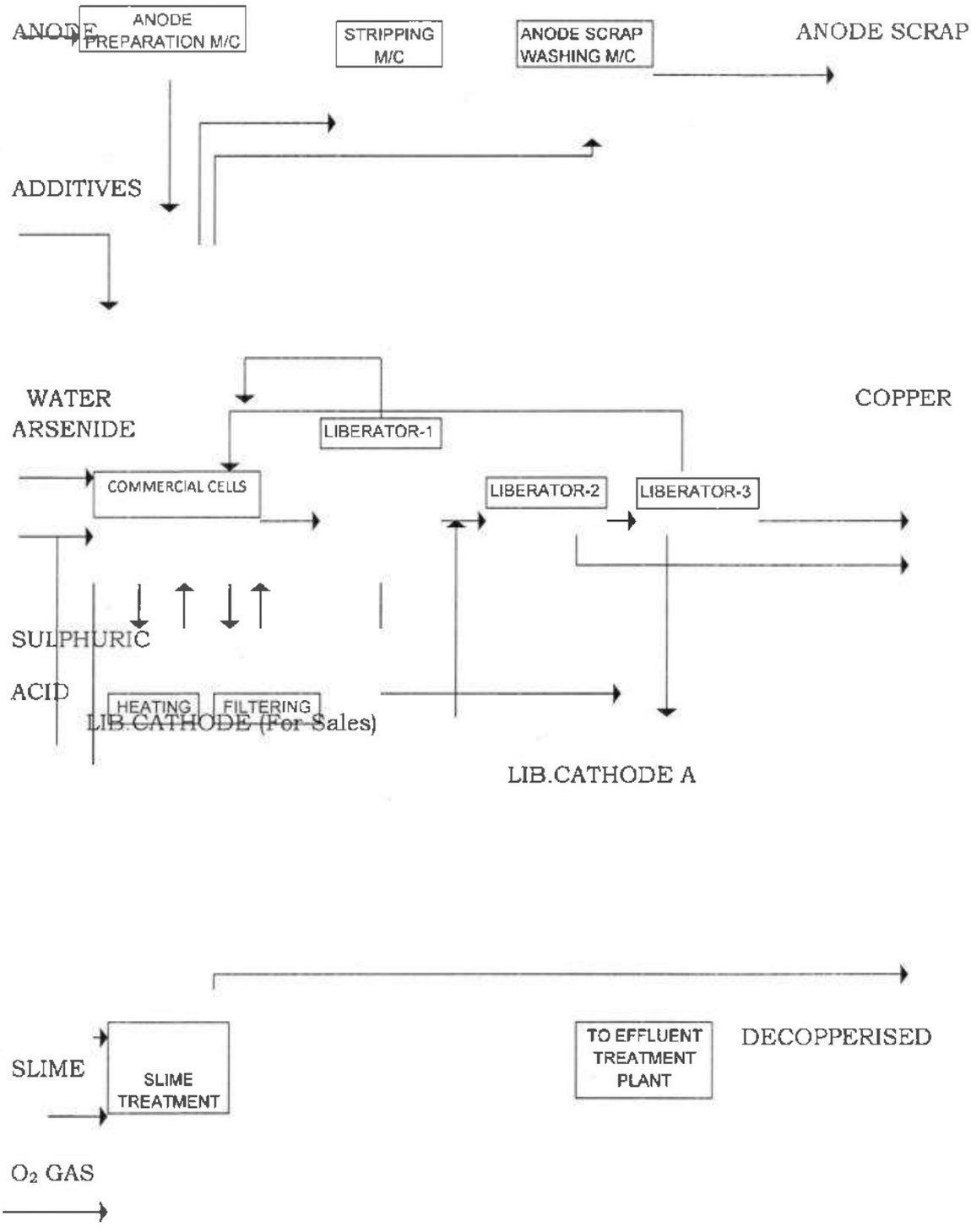
In the slag cleaning furnace, copper is separated to form matte. The separated matte is tapped and charged to the converter. Final slag from slag cleaning furnace contains about 0.7 % Cu which is granulated with water cooling.

REFINERY PLANT

Electro Refinery is the final stage of recovery of Copper in its purest form. In Refinery, Copper is purified from 99.5 % purity to 99.99 % purity through Electrolysis Process. The process of the tankhouse section of the electrolytic refinery of Birla Copper is based on the ISA Process Copper Refining Technology.

In this process Copper is deposited directly on Stainless Steel Cathode Plate and stripped off in Cathode Stripping Machine to get main product of approx 1 sqr.meter Copper plates called Copper cathodes. Input anodes are processed through Anode Preparation Machine for better quality, & scrap anodes are washed through Anode Scrap Wash Machine for recovery of slime.





REFINERY FLOW DIAGRAM

I. Tank house

- *54 anodes and 53 cathodes are loaded into each commercial cell. $CuSO_4/H_2SO_4$ solution is usedas electrolyte. The electrolyte is maintained at ~65°C by means of a heating circuit.*
- *SS plates are taken as cathodes and cast copper anodes are received from the smelter. They are brought by crane to each cell already precisely spaced at 100 mm pitch in a rack.*
- *Power is switched on once the section is filled with anodes, cathodes and electrolyte. The anodes begin to dissolve and pure copper begins to plate on the cathodes.*

- *Fully grown cathodes are removed from the cells after 7 days of plating and a new stainless steel blank is inserted. The cathode copper is washed and sold or sent to melting, casting and rolling.*
- *Three crops of cathodes are produced from each anode.*
- *The cells are inspected regularly during electro-refining to locate short circuited anode/cathode pairs. The inspection is done by hand-held gaussmeters in each cell.*
- *Electro-refining is continued for 21 days at which point the anode is 80-85% dissolved. The complement of un-dissolved scrap is removed from the cell and sent to smelter.*
- *The electrolyte and slimes are drained from the bottom of the cell.*
- *The slimes are sent to a by-product metal recovery plant*
- *The refining cycle then begins again*

Slime Treatment Area

From the Slime Tank, the slime is pumped to the Thickener. Underflow from the Thickener is pumped to prepare a batch for the Leaching Autoclave.

Different operations which are to be performed in the Autoclave are charging, heating leaching, cooling and discharging. From the Autoclave the batch is transferred to the Flash Tank for cooling and there after the whole batch is filtered. The filtrate is then sent to a Filtrate Tank and the filter cake is sent to the PMR plant for further recovery of precious metals like Au and Ag.

III. Purification Area

The main aim of the Purification is to keep the impurities at the desired level in the main Electrolysis circuit and also to maintain the Copper concentration at a desired level in the electrolyte system.

iv. On being specifically asked by the DRI officer, going by the process of manufacture as depicted above, as to when can one expect to have the first crop and the last crop after re-melting in respect of the goods, which were issued on the following five days, he submitted that expected dates of such first & last crops would be as follows:-

Table-5

Date of issue of Goods	Date of receipt of first crop	Date of receipt of last crop after re-melting
15-11-2017	22-11-2017	16-12-2017
26-11-2017	03-12-2017	26-12-2017
13-12-2017	20-12-2017	12-01-2018
18-01-2018	25-01-2018	17-02-2018
04-03-2018	11-03-2018	03-04-2018

2.4 Another Summon was issued to the importer under Section 108 of the Customs Act, 1962. Sri Anand Mohan Mehta appeared on 26-07-2018 and tendered his second statement in view of the submissions made by Shri Raghavendra Adiga, Vice President (Refinery). In his statement Shri Adiga inter-alia submitted that:

i. *He reiterated his submissions made in his statement dated 01-06-2018 as true and correct. Statement of Shri Raghabendra Adiga, Vice President (refinery), was shown to him. In view of the same he stated that to get 100% of the Copper*

Concentrate converted into Copper Cathode and it's by products, a period of at least 30-31 days is required. When he was asked about the dates on which first and last crop could be obtained in respect of the raw materials issued on the following five days, he submitted that expected dates for such first & last crops would be as follows:-

Table-6

Date of issue of Goods	Date of receipt of first crop	Date of receipt of last crop after remelting
15-11-2017	22-11-2017	16-12-2017
26-11-2017	03-12-2017	26-12-2017
13-12-2017	20-12-2017	12-01-2018
18-01-2018	25-01-2018	17-02-2018
04-03-2018	11-03-2018	03-04-2018

ii. *He admitted that the aforesaid five dates are the first dates of issue of raw materials to the floor against the first Bill of Entry pertaining to the following Advance Authorizations.*

Table-7

AA No	AA date	BE No.	BE Date
3410043392	17-08-2017	3657029	17-10-2017
3410043633	14-11-2017	4061453	18-11-2017
3410043689	07-12-2017	4327391	09-12-2017
3410043690	07-12-2017	4804815	15-01-2018
3410043691	07-12-2017	5341598	24-02-2018

iii. *After going through the exports made by them against the said five Advance Authorizations it was seen that considerable quantity of goods were exported even before the first lot of finished goods were manufactured out of the materials issued first against the respective first Bills of Entry. Following Tables show the exact quantum of exports completed before the finished goods were manufactured out of these lot of raw materials.*

Table-8

Advance Authorization specific total EO and date of first & last crop against the first Bill of Entry under which goods were imported						
AA No	AA Date	Total EO	BE No.	Date of issue of Goods	Date of receipt of first crop	Date of receipt of last crop after remelting

3410043392	17-08-2017	22965	3657029	15-11-2017	22-11-2017	16-12-2017
3410043633	14-11-2017	19868	4061453	26-11-2017	03-12-2017	26-12-2017
3410043689	07-12-2017	20440	4327391	13-12-2017	20-12-2017	12-01-2018
3410043690	07-12-2017	20440	4804815	18-01-2018	25-01-2018	17-02-2018
3410043691	07-12-2017	19554	5341598	04-03-2018	11-03-2018	03-04-2018

Table-9

Bill of Entry specific first import and Quantity exported before the first & last crop and percentage thereof in respect of total EO							
BE No.	**Date of issue of Goods**	**Date of receipt of first crop**	**Date of receipt of last crop after re-melting**	**Total EO**	**Qty exported before first crop**	**Qty exported before last crop**	**Percentage of EO completed before last crop**
3657029	15-11-2017	22-11-2017	16-12-2017	22965	15503	15503	67.51
4061453	26-11-2017	03-12-2017	26-12-2017	19868	4161	10991	55.32
4327391	13-12-2017	20-12-2017	12-01-2018	20440	0	10395	50.86
4804815	18-01-2018	25-01-2018	17-02-2018	20440	324	4660	22.80
5341598	04-03-2018	11-03-2018	03-04-2018	19554	0	4859	24.85

iv. Therefore, it was admitted that upto 67.51% of the total Export Obligation was fulfilled by exporting goods manufactured out of raw materials other than the duty-free inputs imported under the respective Advance Authorizations even before the finished goods were produced out of the first lot of the imported duty free materials under the respective Advance Authorization were produced. It was admitted that this has resulted in gross violation of the pre-import condition. As the above Charts clearly establishes that fact that they did not manufacture finished goods, which were ultimately exported for discharge of export obligation against respective Advance Authorizations, they have violated the pre-import condition. It appears that for these five Advance Authorizations, such pre-import condition was not followed, they were not eligible for IGST exemption in terms of condition (xii) of the Customs notification No. 18/2015 dated 01-04-2015.

*v. It has been decided that they would pay the entire amount of Customs duty in the form of IGST amounting to **Rs 181,48,31,788/-** within a month or two.*

2.5 From the data submitted by the authorized representatives of the company and the corresponding documents like original Bills of Entry under which goods were imported, first Bill of Entry in respect of every Advance Authorization and corresponding first Shipping Bill, Goods Receipt Note, Consumption Register and Issue Register, it is established that the goods were exported much before the first lot of finished goods could be produced using the input materials imported duty-free under the respective Advance Authorization. From the tables above, it is crystal clear that even if only the consignment imported under the first Bill of Entry against each Advance Authorization is taken into account, and only the first lot of materials issued to the floor for production is considered, still, the first lot of production was made available to the importer for export, after completion of export obligation to the extent of upto 67% of the total export obligation. Quite naturally, input materials imported subsequently at a later date, couldn't have gone into production of goods, which could

have already been exported towards discharge of export obligation of the respective Advance Authorizations. Therefore, despite having imported the input materials under cover of Bills of Entry which were filed before the first consignment under the concerned Advance Authorization was exported, but record shows explicitly that the goods exported for discharge of export obligation in respect of the impugned Advance Authorizations, were made out of domestic / otherwise procured input materials and the duty free materials imported under the respective Advance Authorization could not have been used for manufacture of the said goods. Therefore, such duty-free imported goods have never been used for the specified purpose of manufacture of goods for export under the respective Advance Authorization. Although, during recording of the statement, it was stated that the amount of IGST involved was Rs 181, 48, 31, 788/-, but at the time of payment through re-assessment of the respective Bills of Entry, actual liability was found to be **Rs 183,10,80,587/-.**

2.6 Thus, the authorized representative of the importer in unequivocal terms admitted that -

i) In case of all 05 (Five) Authorizations, they started exporting finished goods even before the imported duty-free materials could be used for the purpose of manufacture of finished goods.They utilized domestically/otherwise procured materials for the purpose of manufacture of goods, which were exported towards discharge of export obligation of the respective Advance Authorization;

ii) Although, the imports as per record commenced prior to commencement of exports, but from the internal records of goods receipt notes and consumption register etc, it was evident, that the imported goods were issued to the floor for production after commencement of considerable quantity of exports. It is also a matter on record that the production of finished goods under normal circumstances takes about 30-31 days straight. Therefore, it was neither feasible nor practicable to manufacture goods out of the inputs imported under the aforementioned 26 Nos. of Bills of Entry, which could have been exported under the respective Advance Authorizations.

iii) Considerable materials exported under the impugned Advance Authorizations were manufactured out of input materials procured from the domestic market or otherwise;

iv) Significant quantity of the duty-free imported materials was used to manufacture goods, which were not used for the specified purpose, i.e manufacture of export goods;

v) They could not comply with the pre-import condition imposed by virtue of Notification No. 79/2017-Cus dated 13-10-2017, but still availed benefit of exemption of IGST, in violation of the condition of the said Notification.

3. LEGAL PROVISIONS:

3.1 Following provisions of law, which are relevant, have been quoted in Annexure-A attached to the Show Cause Notice.

a) Para 4.03 of the Foreign Trade Policy (2015-20);
b) Para 4.05 of the Foreign Trade Policy (2015-20);
c) Para 4.13 of the Foreign Trade Policy (2015-20);

d) Para 4.14 of the Foreign Trade Policy (2015-20);
e) 9.20 of the Foreign Trade Policy (2015-20);
f) Para 4.27 of the Hand Book of Procedures (2015-20);
g) Section 2(e) of the Foreign Trade (DR) Act, 1992;
h) DGFT Notification No. 33/2015-20 dated 13-10-2017;
i) DGFT Notification No. 31/2013 (RE-2013) dated: - 01-08-2013;
j) DGFT Circular No. 3/2013 (RE-2013) dated, 02-08-2013;
k) Notification No 18/2015-Customs dated 01-04-2015;
l) Notification No 79/2017-Customs dated 13-10-2017;
m) Section 17 of the Customs Act, 1962;
n) Section 46 (4) of the Customs Act, 1962;
o) Section 111(o) of the Customs Act, 1962;
p) Section 112(a) of the Customs Act;
q) Section 124 of the Customs Act, 1962;

a) Para 4.03 of the Foreign Trade Policy (2015-20) inter-alia states that :-

An Advance Authorisation is issued to allow duty free import of inputs, which are physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, energy, catalysts which are consumed/ utilised to obtain export product, may also be allowed DGFT, by means of Public Notice, may exclude any product(s) from purview of Advance Authorisation.

b) Para 4.05 of the Foreign Trade Policy (2015-20) inter-alia states that :-

4.05 Eligible Applicant / Export / Supply

(a) Advance Authorisation can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer.

(b) Advance Authorisation for pharmaceutical products manufactured through Non-Infringing (NI) process (as indicated in paragraph 4.18 of Handbook of Procedures) shall be issued to manufacturer exporter only.

(c) Advance Authorisation shall be issued for:

(i) Physical export (including export to SEZ);

(ii) Intermediate supply; and/or

(iii) Supply of goods to the categories mentioned in paragraph 7.02 (b), (c), (e), (f), (g) and (h) of this FTP. (iv) Supply of 'stores' on board of foreign going vessel / aircraft, subject to condition that there is specific Standard Input Output Norms in respect of item supplied.

c) Para 4.13 Foreign Trade Policy (2015-20) inter-alia states that :-

4.13 Pre-import condition in certain cases-

(i) DGFT may, by Notification, impose pre-import condition for inputs under this Chapter.

(ii) Import items subject to pre-import condition are listed in Appendix 4-J or will be as indicated in Standard Input Output Norms (SION).

(iii) Import of drugs from unregistered sources shall have pre-import condition.

d) Para 4.14 Foreign Trade Policy (2015-20) inter-alia states that :-

4.14 Details of Duties exempted-

Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorisation for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition. Imports against Advance Authorisations for physical exports are exempted from Integrated Tax and Compensation Cess upto 31.03.2018 only.

e) Para 9.20 Foreign Trade Policy (2015-20) inter-alia states that :-

9.20
"Export" is as defined in FT (D&R) Act, 1992, as amended from time to time.

f) *4.27 Exports/Supplies in anticipation or subsequent to issue of an Authorisation.*

(a) Exports / supplies made from the date of EDI generated file number for an Advance Authorisation, may be accepted towards discharge of EO. Shipping / Supply document(s) should be endorsed with File Number or Authorisation Number to establish co-relation of exports / supplies with Authorisation issued. Export/supply document(s) should also contain details of exempted materials/inputs consumed.

(b) If application is approved, authorisation shall be issued based on input / output norms in force on the date of receipt of application by Regional Authority. If in the intervening period (i.e. from date of filing of application and date of issue of authorisation) the norms get changed, the authorization will be issued in proportion to provisional exports / supplies already made till any amendment in norms is notified. For remaining exports, Policy / Procedures in force on date of issue of authorisation shall be applicable.

(c) The export of SCOMET items shall not be permitted against an Authorisation until and unless the requisite SCOMET Authorisation is obtained by the applicant.

(d) Exports/supplies made in anticipation of authorisation shall not be eligible for inputs with pre-import condition.

g) Section 2(e) of the Foreign Trade (DR) Act, 1992 states that :-

(e) "import" and 'export" means respectively bringing into, or taking out of, India any goods by land, sea or air;

h) *Notification No.33/2015-2020 New Delhi,*
Dated: 13 October, 2017
Subject: Amendments in Foreign Trade Policy 2015-20 -reg

S.O. (E): In exercise of powers conferred by Section 5 of FT (D&R) Act, 1992, read with paragraph 1.02 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby makes following amendments in Foreign Trade Policy 2015-20. 1. Para 4.14 is amended to read as under: "4.14: Details of Duties exempted Imports under Advance Authorisation are exempted from payment of Basic Customs

Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorization for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition."

.....

i) NOTIFICATION NO. 31 (RE-2013)/ 2009-2014
NEW DELHI, DATED THE 1st August, 2013

In exercise of powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No.22 of 1992) read with paragraph 1.2 of the Foreign Trade Policy, 2009-2014, the Central Government hereby notifies the following amendments in the Foreign Trade Policy (FTP) 2009-2014.

2. After para 4.1.14 of FTP a new para 4.1.15 is inserted.

"4.1.15 Wherever SION permits use of either (a) a generic input or (b) alternative inputs, unless the name of the specific input(s) fwhich has (have) been used in manufacturing the export product] gets indicated / endorsed in the relevant shipping bill and these inputs, so endorsed, match the description in the relevant bill of entry, the concerned Authorisation will not be redeemed. In other words, the name/description of the input used (or to be used) in the Authorisation must match exactly the name/description endorsed in the shipping bill. At the time of discharge of export obligation (EODC) or at the time of redemption, RA shall allow only those inputs which have been specifically indicated in the shipping bill."

3. Para 4.2.3 of FTP is being amended by adding the phrase "4.1.14 and 4.1.15" in place of "and 4.1.14". The amended para would be as under:

"Provisions of paragraphs 4.1.11, 4.1.12, 4.1.13, 4.1.14 and 4.1.15 of FTP shall be applicable for DFIA holder."

*4. **Effect of this Notification:** Inputs actually used in manufacture of the export product should only be imported under the authorisation. Similarly inputs actually imported must be used in the export product. This has to be established in respect of every Advance Authorisation / DFIA.*

j) Policy Circular No.03 (RE-2013)/2009-2014
Dated the 2nd August, 2013

Subject: Withdrawal of Policy Circular No.30 dated 10.10.2005 on Importability of Alternative inputs allowed as per SION.

Notification No.31 has been issued on 1st August, 2013 which stipulates "inputs actually used in manufacture of the export product should only be imported under the authorisation. Similarly inputs actually imported must be used in the export product." Accordingly, the earlier Policy Circular No.30 dated 10.10.2005 becomes infructuous and hence stands withdrawn.

2. This is to reiterate that duty free import of inputs under Duty Exemption/Remission Schemes under Chapter-4 of FTP shall be guided by the

Notification No. 31 issued on 1.8.2013. Hence any clarification or notification or communication issued by this Directorate on this matter which may be repugnant to this Notification shall be deemed to have been superseded to the extent of such repugnancy.

k) Notification No. 18/2015 - Customs, Dated: 01-04-2015-

G.S.R. 254 (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India against a valid Advance Authorisation issued by the Regional Authority in terms of paragraph 4.03 of the Foreign Trade Policy (hereinafter referred to as the said authorisation) from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty, safeguard duty, transitional product specific safeguard duty and anti-dumping duty leviable thereon, respectively, under sections 3, 8B, 8C and 9A of the said Customs Tariff Act, subject to the following conditions, namely :-

(i) that the said authorisation is produced before the proper officer of customs at the time of clearance for debit;

(ii) that the said authorisation bears,-

(a) the name and address of the importer and the supporting manufacturer in cases where the authorisation has been issued to a merchant exporter; and

(b) the shipping bill number(s) and date(s) and description, quantity and value of exports of the resultant product in cases where import takes place after fulfilment of export obligation; or

(c) the description and other specifications where applicable of the imported materials and the description, quantity and value of exports of the resultant product in cases where import takes place before fulfilment of export obligation;

(iii) that the materials imported correspond to the description and other specifications where applicable mentioned in the authorisation and are in terms of para 4.12 of the Foreign Trade Policy and the value and quantity thereof are within the limits specified in the said authorisation;

(iv) that in respect of imports made before the discharge of export obligation in full, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen percent per annum from the date of clearance of the said materials;

(v) that in respect of imports made after the discharge of export obligation in full, if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or of CENVAT Credit under CENVAT Credit Rules, 2004 has been availed, then the importer shall, at the time of clearance of the imported materials furnish a bond to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself, to use the imported materials in his factory or in the factory of his supporting manufacturer for the manufacture of dutiable goods and to submit a certificate, from the jurisdictional Central Excise officer or from a specified chartered

accountant within six months from the date of clearance of the said materials, that the imported materials have been so used:

Provided that if the importer pays additional duty of customs leviable on the imported materials but for the exemption contained herein, then the imported materials may be cleared without furnishing a bond specified in this condition and the additional duty of customs so paid shall be eligible for availing CENVAT Credit under the CENVAT Credit Rules, 2004;

(vi) that in respect of imports made after the discharge of export obligation in full, and if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or of CENVAT credit under CENVAT Credit Rules, 2004 has not been availed and the importer furnishes proof to this effect to the satisfaction of the Deputy Commissioner of Customs or the Assistant Commissioner of Customs as the case may be, then the imported materials may be cleared without furnishing a bond specified in condition (v);

(vii) that the imports and exports are undertaken through the seaports, airports or through the inland container depots or through the land customs stations as mentioned in the Table 2 annexed to the Notification No.16/ 2015- Customs dated 01.04.2015 or a Special Economic Zone notified under section 4 of the Special Economic Zones Act, 2005 (28 of 2005):

Provided that the Commissioner of Customs may, by special order or a public notice and subject to such conditions as may be specified by him, permit import and export through any other sea-port, airport, inland container depot or through a land customs station within his jurisdiction;

(viii) that the export obligation as specified in the said authorisation (both in value and quantity terms) is discharged within the period specified in the said authorisation or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorisation:

Provided that an Advance Intermediate authorisation holder shall discharge export obligation by supplying the resultant products to exporter in terms of paragraph 4.05 (c) (ii) of the Foreign Trade Policy;

(ix) that the importer produces evidence of discharge of export obligation to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, within a period of sixty days of the expiry of period allowed for fulfilment of export obligation, or within such extended period as the said Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may allow;

(x) that the said authorisation shall not be transferred and the said materials shall not be transferred or sold;

Provided that the said materials may be transferred to a job worker for processing subject to complying with the conditions specified in the relevant Central Excise notifications permitting transfer of materials for job work;

Provided further that, no such transfer for purposes of job work shall be effected to the units located in areas eligible for area based exemptions from the levy of excise duty in terms of notification Nos. 32/1999-Central Excise dated 08.07.1999, 33/1999-Central Excise dated 08.07.1999, 39/2001- Central Excise dated 31.07.2001, 56/2002-Central Excise dated 14.11.2002, 57/2002- Central Excise dated 14.11.2002, 49/2003- Central Excise dated 10.06.2003, 50/2003- Central Excise dated 10.06.2003, 56/2003- Central Excise dated 25.06.2003, 71/03- Central Excise dated

09.09.2003, 8/2004- Central Excise dated 21.01.2004 and 20/2007- Central Excise dated 25.04.2007;

(xi) that in relation to the said authorisation issued to a merchant exporter, any bond required to be executed by the importer in terms of this notification shall be executed jointly by the merchant exporter and the supporting manufacturer binding themselves jointly and severally to comply with the conditions specified in this notification.

l) Notification No._79/2017 - Customs, Dated: 13-10-2017-

Central Government, on being satisfied that it is necessary in the public interest so to do, made the following further amendments in each of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table below, in the manner as specified in the corresponding entry in column (3) of the said Table:-

-: Table:-

S. No.	*Notification number and date*	*Amendments*
(1)	*(2)*	*(3)*
1	*16/2015-Customs, dated the 1 st April, 2015 [vide number G.S.R. 252(E), dated the 1 st April, 2015]*	*In the said notification,- (a) in the opening paragraph, after clause (ii), the following shall be inserted, namely:- "(iii) the whole of integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the said Customs Tariff Act: Provided that the exemption from integrated tax and the goods and services tax compensation cess shall be available up to the 31st March, 2018."; (b) in the Explanation C (II), for the words "However, the following categories of supplies, shall also be counted towards fulfilment of export obligation:", the words "However, in authorisations where exemption from integrated tax and goods and service tax compensation cess is not availed, the following categories of supplies, shall also be counted towards fulfilment of export obligation:" shall be substituted.*
2.	*18/2015-Customs, dated the 1 st April, 2015 [vide number G.S.R. 254 (E), dated the 1 st April, 2015]*	*In the said notification, in the opening paragraph,- (a) for the words, brackets, figures and letters "from the whole of the additional duty leviable thereon under sub- 2 sections (1), (3) and (5) of section 3, safeguard duty leviable thereon under section 8B and anti-dumping duty leviable thereon under section 9A", the words, brackets, figures and letters "from the whole of the additional duty leviable thereon under sub-sections (1), (3) and (5) of section 3, integrated tax leviable thereon under sub-section (7) of section 3, goods and services tax compensation cess leviable thereon under sub-section (9) of section 3, safeguard duty leviable thereon under section 8B, countervailing duty leviable thereon under section 9 and anti-dumping duty leviable thereon under*

		section 9A" shall be substituted; *(b) in condition (viii), after the proviso, the following proviso shall be inserted, namely:-* *"Provided further that notwithstanding anything contained hereinabove for the said authorisations where the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9)* ***of section 3 of the said Customs Tariff Act, has been availed, the export obligation shall be fulfilled by physical exports only;";*** *(c) after condition (xi), the following conditions shall be inserted, namely :-* *"(xii) that the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section* ***3 of the said Customs Tariff Act shall be subject to pre-import condition;*** *(xiii) that the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of* ***section 3 of the said Customs Tariff Act shall be available up to the 31st March, 2018.".***

m) <u>Section 17 (1) of the Customs Act, 1962 reads as:-</u>

[SECTION 17. Assessment of duty. – (1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the entries made under section 46 or section 50 and the self-assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

(3) For the purposes of verification under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self- assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-

assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re- assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

Explanation.- For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.

n) Section 46 (4) of the Customs Act, 1962 reads as:-

"The importer while presenting a Bill of Entry, shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods....."

o) Section 111 (o) of the Customs Act, 1962 inter alia stipulates-

"111. Confiscation of improperly imported goods, etc. -
The following goods brought from a place outside India shall be liable to confiscation: -
.....
(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;"

p) Further section 112 of the Customs Act, 1962 provides for penal action and inter-alia stipulates:-

Any person shall be liable to penalty for improper importation of goods,-

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, ..."

q) Section 124 of the Customs Act, 1962 inter alia stipulates :-

No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person

(a) is given a notice in writing with the prior approval of the officer of customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter :

4. DISCUSSION & CHARGES FRAMED:

4.1 Imposition of two conditions for availing the IGST exemption in terms of Notification No. 79/2017-Cus dated 13-10-2017:-

4.1 Advance Authorizations are issued by the Directorate General of Foreign Trade (DGFT) to importers for import of various raw materials without payment of Customs duty and the said export promotional scheme is governed by Chapter 4 of the Foreign Trade Policy (2015-20), applicable for subject case and corresponding Chapter 4 of the Hand Book of Procedures (2015-20). Prior to GST regime, in terms of the provisions of Para 4.14 of the prevailing Foreign Trade Policy (2015-20), the importer was allowed to enjoy benefit of exemption in respect of Basic Customs duty as well as Additional Customs duties, Anti-dumping duty and Safeguard duty, while importing such input materials under Advance Authorizations.

4.2 With the introduction of GST w.e.f 01-01-2017, Additional Customs duties (CVD & SAD) were subsumed into the newly introduced Integrated Goods and Service Tax (IGST). Therefore, at the time of imports, in addition to Basic Customs duty, IGST was made payable instead of such additional duties of Customs. Accordingly, Notification No. 26/2017-Customs dated 29 June 2017, was issued to give effect to the changes introduced in the GST regime in respect of imports under Advance Authorization. It was a conscious decision to impose IGST at the time of import, however, at the same time, importers were allowed to either take credit of such IGST for payments of duty during supply to DTA, or to take refund of such IGST amount within a specified period. The corresponding changes in the Policy were brought through Trade Notice No. 11/2018 dated 30-06-2017. It is pertinent to note here that while in pre-GST regime blanket exemption was allowed in respect of all duties leviable when goods were being imported under Advance Authorizations, contrary to that, in post-GST regime, for imports under Advance Authorization, the importers were required to pay such IGST at the time of imports and then they could get the credit of the same.

4.3 However, subsequently, the Government of India decided to exempt imports under Advance Authorizations from payment of IGST, by introduction of the Customs Notification no. 79/2017 dated 13-10-2017. However, such exemption from the payment of IGST was made conditional. The said Notification no. 79/2017 dated 13-10-2017, was issued with the intent of incorporating certain changes/ amendment in the principal Customs Notifications, which were issued for extending benefit of exemption to the goods when imported under Advance Authorizations. The said notification stated that the Central Government, on being satisfied that it is necessary in the public interest so to do, made the following further amendments in each of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table below, in the manner as specified in the corresponding entry in column (3) of the said Table. Only the relevant portion pertaining to the Customs Notification No. 18/2015 dated 01-04-2015 is reproduced in Para 3(j) above, which may be referred to.

4.4 Therefore, by issuing the subject Notification No. 79/2017-Cus dated 13-10-2017, the Government of India amended inter-alia Notification No. 18/2015-Cus dated 01-04-2015, and extended exemption from the payment of IGST at the time of import of input materials under Advance Authorizations. But such exemption was not absolute. As a rider, certain conditions were incorporated in the subject notification. One being the condition that such exemption can only be extended so long as exports made under the Advance Authorization are physical exports in nature and the other being the condition that to avail such benefit one has to follow the pre-import condition.

4.5 The Director General of Foreign Trade, in the meanwhile, issued one Notification No. 33/2015-20 dated 13-10-2017, which amended the provision of Para 4.14 of the Foreign Trade Policy (2015-20), **to incorporate the exemption from**

IGST, subject to compliance of the pre-import and physical export conditions. It is pertinent to mention, that the principal Customs Notification No. 18/2015-Cus, being an EXIM notification, was amended by the Notification No. 79/2017-Cus dated 13-10-2017, in tandem with the changed Policy by integrating the same provisions for proper implementation of the provisions of the Foreign Trade Policy (2015-20).

5. Therefore, conscious legislative intent is apparent in the changes made in the Foreign Trade Policy (2015-20) and corresponding changes in the relevant Customs notifications, that to avail the benefit of exemption in respect of Integrated Goods and Service Tax (IGST), one would require to comply with the following two conditions: -

i) All exports under the Advance Authorization should be physical exports, therefore, debarring any deemed export from being considered towards discharge of export obligation;

ii) Pre-import condition has to be followed, which requires materials to be imported first and then be used for manufacture of the finished goods, which could in turn be exported for discharge of EO;

6. Physical Export condition in relation to the Foreign Trade Policy (2015-20) and the Notification No. 79/2017-Cus dated 13-10-2017, and whether it was followed by the importer.

6.1 The concept of physical export is derived from Para 4.05(c) and Para 9.20 of the Foreign Trade Policy (2015-20) read with section 2(e) of the Foreign Trade (DR) Act, 1992. Para 9.20 of the Policy refers to section 2(e) of the Foreign Trade (DR) Act, 1992, which defines 'Export' as follows:-

(e)"import" and 'export" means respectively bringing into, or taking out of, India any goods by land, sea or air;

Therefore, primarily, export involves taking out goods out of India, however, in Chapter 4 of the Policy, Para 4.05 defines premises under which Advance Authorizations could be issued and states that -

(c) Advance Authorization shall be issued for:

(i) Physical export (including export to SEZ);

(ii) Intermediate supply; and/or

(iii) Supply of goods to the categories mentioned in paragraph 7.02 (b), (c), (e), (f), (g) and (h) of this FTP.

(iv) Supply of 'stores' on board of foreign going vessel / aircraft, subject to condition that there is specific Standard Input Output Norms in respect of item supplied.

6.2 Therefore, the definition has been further extended in specific terms under Chapter 4 of the Policy and the supplies made to SEZ, despite not being an event in which goods are being taken out of India, are considered as Physical Exports. However, other three categories defined under (c) (ii), (iii) & (iv) do not qualify as physical exports. Supplies of intermediate goods are covered by Letter of Invalidation, whereas, supplies covered under Chapter 7 of the Policy are considered as Deemed Exports. None of these supplies are eligible for being considered as physical exports. Therefore, any category of supply, be it under letter of Invalidation and/or to EOU and/or under International Competitive Bidding (ICB) and/or to Mega Power Projects, other than actual exports to other country and supply to SEZ, cannot be considered as Physical Exports for the purpose of Chapter 4 of the Foreign Trade Policy (2015-20).

6.3 This implies that to avail the benefit of exemption as extended through amendment of Para 4.14 of the Policy by virtue of the DGFT Notification No. 33/2015-20 dated 13-10-2017, one has to ensure that the entire exports made under an Advance Authorization towards discharge of EO are physical exports. In case the entire exports made, do not fall in the category of physical exports, the Advance Authorization automatically sets disqualified for the purpose of exemption.

6.4 In the present case, there has been no violation of the physical export condition by the noticee, as their entire exports were physical export and under the subject Advance Authorizations, no deemed exports were made.

7. Pre-import condition in relation to the Foreign Trade Policy (2015-20) and the Notification No. 79/2017-Cus dated 13-10-2017; Determination of whether the goods imported under the impugned Advance Authorization comply with the pre-import condition, and whether it was followed by the importer.

7.1 Pre-import condition has been part of the Policy for long. In terms of Para 4.13 of the Policy, there are certain goods for which pre-import condition was made applicable through issuance of DGFT Notification way before the notification dated 13-10-2017 came into being.

7.2 The definition of pre-import directly flows from Para 4.03 of the Foreign Trade Policy (2015-20)[erstwhile Para 4.1.3 of the Policy (2009-14)]. **It demands that Advance Authorizations are issued for import of inputs, which are physically incorporated in the export goods allowing legitimate wastage. This Para specifically demands for such physical incorporation of imported materials in the export goods. And the same is only possible, when imports are made prior to export. Therefore, such Authorizations principally do have the pre-import condition in-built,** which is required to be followed, barring where otherwise use has been allowed in terms of Para 4.27 of the Foreign Trade Policy (2015-20)[erstwhile Para 4.12 of the Policy (2009-14)].

7.3 Advance Authorization are issued for import of duty-free materials first, which would be used for the purpose of manufacture of export goods, which would be exported out of India or be supplied under deemed export, if allowed by the Policy or the Customs Notification. The very name Advance Authorization was coined with prefix 'Advance', which illustrates and indicates the basic purpose as aforesaid. Spirit of the scheme is further understood, from the bare fact that while time allowed for import is 12 months (conditionally extendable by another six months) from the date of issue of the Authorization, and time allowed for export is 18 months (conditionally extendable by 6 months twice) from the date of issue of the Authorization. The reason for the same was the practical fact that conversion of input materials into finished goods ready for export, takes considerable time depending upon the process of manufacture.

7.4 DGFT Notification No. 31/2013 (RE-2013) dated: - 01-08-2013, was issued to incorporate a new Para No. 4.1.15 in the Foreign Trade Policy. The said Para is an extension of the Para 4.1.3[Para 4.03 of the Policy (2015-200] and stipulated further condition which clarified the ambit of the aforesaid Para 4.1.3. **Inputs actually imported must be used in the export product.**

7.5 A Circular No. 3/2013 (RE-2013) dated, 02-08-2013, was also issued by the Ministry of Commerce in line with the aforesaid notification. The Circular reiterates that duty free import of inputs under Duty Exemption/Remission Schemes under Chapter-4 of FTP shall be guided by the Notification No. 31 issued on 1.8.2013.

7.6 Therefore, combined reading of Para 4.03 of the Foreign Trade Policy, in force at the time of issuance of the authorizations, and the notification aforesaid along with the Circular as mentioned above, makes it obvious, that **benefit of exemption from payment of Customs duty is extended to the input materials subject to strict**

condition, that such materials would be exclusively used in the manufacture of export goods which would be ultimately exported. Therefore, the importer does not have the liberty to utilize such duty-free materials otherwise, nor do they have freedom to export goods manufactured out of something, which was not actually imported.

7.7 Therefore, such Authorizations principally do have the pre-import condition in-built, which is required to be followed, barring where otherwise use has been allowed in terms of Para 4.27 of the Foreign Trade Policy (2015-20) [erstwhile Para 4.12 of the Policy (2009-14)]. Para 4.27 of the Hand Book of Procedures for the relevant period allows exports/supplies in anticipation of an Authorization. This provision has been made as an exception to meet the requirement in case of exigencies. However, the importers/exporters have been availing the benefit of the said provision without exception and the export goods are made out of domestically or otherwise procured materials and the duty-free imported goods are used for purposes other than the manufacture of the export goods. However, Para 4.27 (d) has barred such benefit of export in anticipation of Authorization for the inputs with pre-import condition.

7.8 Specific provision under the said Para 4.27 (d) was made, which states that –

> ***(d) Exports/supplies made in anticipation of authorization shall not be eligible for inputs with pre-import condition.***

Therefore, whenever pre-import condition is applicable in respect of the goods to be imported, the Advance Authorization holder does not have any liberty to export in anticipation of Authorization. The moment input materials are subject to pre-import condition, they become ineligible for export in anticipation of Authorization, by virtue of the said provision of Para 4.27 (d).

7.9 The pre-import condition requires the imported materials to be used for the manufacture of finished goods, which are in turn required to be exported towards discharge of export obligation, and the same is only possible when the export happens subsequent to the commencement of imports after allowing reasonable time to manufacture finished goods out of the same. Therefore, when the law demands pre-import condition on the input materials to be imported, goods cannot be exported in anticipation of Advance Authorization. **Provisions of Para 4.27(a) & (b), i.e. export in anticipation of Authorization and the pre-import condition on the input materials are mutually exclusive and cannot go hand in hand**.

8.1 Advance Authorization Scheme is not just another scheme, where one is allowed to import goods duty free, for which the sole liability of the beneficiary is to complete export obligation only by exporting goods mentioned in the authorization. **It is not a scheme that gives carte blanche to the importer, so far as utilization of imported materials is concerned. Rather, barring a few exceptions covered by the Policy and the notification, it requires such duty-free imported materials to be used specifically for the purpose of manufacture of export goods.** As discussed above, the scheme requires physical incorporation of the imported materials in the export goods after allowing normal wastage. Export goods are required to be manufactured out of the very materials which have been imported duty free. **The law does not permit replenishment**. The High Court of Allahabad in the case of *Dharampur Sugar Mill* reported in *2015 (321) ELT 0565 (All.)* has observed that:-

> ***" From the records we find that the import authorization requires the physical incorporation of the imported input in export product after allowing normal wastage, reference clause 4.1.3.*** *In the instant case, the assessee has hopelessly failed to establish the physical incorporation of the imported input in the exported sugar. The Assessing Authority and the Tribunal appears to be correct in recording a finding that the appellant has violated the provisions of Customs Act, in exporting sugar without there being any 'Export Release Order' in the facts of this case."*

8.2 The Hon'ble Supreme Court in the case of *Pennar Industries* reported in *TIOL-2015-(162)-SC-CUS* has held that :-

> *"It would mean that not only the raw material imported (in respect of which exemption from duty is sought) is to be utilized in the manner mentioned, namely, for manufacture of specified products by the importer/assessee itself, this very material has to be utilized in discharge of export obligation.* ***It, thus, becomes abundantly clear that as per this Notification, in order to avail the exemption from import duty, it is necessary to make export of the product manufactured from that very raw material which is imported.*** *This condition is admittedly not fulfilled by the assessee as there is no export of the goods from the raw material so utilized. Instead, export is of the product manufactured from other material, that too through third party. Therefore, in strict sense, the mandate of the said Notification has not been fulfilled by the assessee."*

8.3 The High Court of Madras (Madurai Bench) in the case of M/s Vedanta Ltd on the issue under consideration held that:-

> **"pre-import simply means import of raw materials before export of the finished goods to enable the physical export and actual user condition possible and negate the revenue risk that is plausible by diverting the imported goods in the local market".**

8.4 Conditions No. (v) & (vi) of the Notification No. 18/2015-Cus dated 01-04-2015, prescribe the modalities to be followed for import of duty-free goods under Advance Authorization, in cases, where export obligation is discharged in full, before the commencement of imports. This is to ensure that the importer does not enjoy the benefit of duty exemption on raw materials twice for the same export. It is but natural that in such a situation the importer would have used domestically procured materials for the purpose of manufacture of goods that have been exported and on which required duties would have been paid and credit of the same would also have been availed by the importer. The importer has in this kind of situation, two options in terms of the above notification:

8.4.1 The first option is elucidated in condition No. (v) of the notification, which is as under-

> *"(v) that in respect of imports made after the discharge of export obligation in full, if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or of CENVAT Credit under CENVAT Credit Rules, 2004 has been availed, then the importer shall, at the time of clearance of the imported materials furnish a bond to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself, to use the imported materials in his factory or in the factory of his supporting manufacturer for the manufacture of dutiable goods and to submit a certificate, from the jurisdictional Central Excise officer or from a specified chartered accountant within six months from the date of clearance of the said materials, that the imported materials have been so used:*
>
> *Provided that if the importer pays additional duty of customs leviable on the imported materials but for the exemption contained herein, then the imported materials may be cleared without furnishing a bond specified in this condition and the additional duty of customs so paid shall be eligible for availing CENVAT Credit under the CENVAT Credit Rules, 2004;"*

8.4.2 The second option is similarly elaborated in condition no. (vi) of the notification, as under-

"(vi) that in respect of imports made after the discharge of export obligation in full, and if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or of CENVAT credit under CENVAT Credit Rules, 2004 has not been availed and the importer furnishes proof to this effect to the satisfaction of the Deputy Commissioner of Customs or the Assistant Commissioner of Customs as the case may be, then the imported materials may be cleared without furnishing a bond specified in condition (v);"

8.5 Thus, the purport of the above conditions in the erstwhile notification is to ensure that if domestically procured inputs have been used for manufacture of the exported goods and the inputs are imported duty-free after the exports, then the benefit of "zero-rating" of exports is not availed by the exporter twice.

8.6 Thus, insertion of such conditions in the notification, is indicative of legislative intent of keeping check on possible misuse of the scheme. However, ensuring compliance of these two conditions is not easy, on the other hand, such conditions are vulnerable to be mis-used and have the inherent danger to pave way for 'rent-seeking'. Therefore, to **plug the loop-hole, and to facilitate & streamline the implementation of the export incentive scheme, in the post-GST scenario the concept of "Pre-Import" and "Physical Export" was introduced in the subject Notification**, which make the said conditions (v) & (vi) infructuous. This is also in keeping with the philosophy of GST legislation to remove as many conditional exemptions as possible and instead provide for zero-rating of exports through the option of taking credit of the IGST duties paid on the imported inputs, at the time of processing of the said inputs.

8.7 It is the duty of an importer seeking benefits of exemption extended by Customs Notifications issued by the Government of India/ Ministry of Finance, to comply with the conditions imposed in the notification, which determines, whether or not one becomes eligible for the exemption. **Exemption from payment of duty is not a matter of right, if the same comes with conditions which are required to be complied with. It is a pre-requisite that only if such conditions are followed, that one becomes eligible for such benefit. As discussed above, such conditions have been brought in with the objective of facilitating zero-rating of exports with minimal compliance and maximum facilitation.**

9.1 IGST benefit is available against Advance Authorizations subject to observance of pre-import condition in terms of the condition of the Para 4.14 of the Foreign Trade Policy (2015-20) & also the conditions of the newly introduced condition (xii) of Customs Notification No. 18/2015 dated 01-04-2015 as added by Notification No. 79/2017-Cus dated 13-10-2017. Such pre-import condition requires goods to be imported prior to commencement of exports to ensure manufacturing of finished goods made out of the duty-free inputs so imported. These finished goods are then to be exported under the very Advance Authorization towards discharge of export obligation. As per provision of Para 4.03 of the Foreign Trade Policy (2015-20), physical incorporation of the imported materials in the export goods is obligatory, and the same is feasible only when the imports precedes export.

9.2 The following tests enables one to determine whether the pre-import condition in respect of the duty-free imported goods have been satisfied or not:

i) If the importer fulfils a part or complete export obligation, in respect of an Advance Authorization, even before commencement of any import under the subject Advance Authorization, **it is implied that such imported materials have not gone into production of goods that have been exported**, by which the export obligation has been discharged. Therefore, pre-import condition is violated.

ii) Even if the date of the first Bill of Entry under which goods have been imported under an Authorization is prior to the date of the first Shipping Bill through which exports have been made, indicating exports happened subsequent to import, but if documentary evidences establish that the consignments, so imported, were received at a later stage in the factory after the commencement of exports, then the goods exported under the Advance Authorization could not have been manufactured out of the duty free imported goods. This aspect can be verified from the date of the Goods Receipt Note (GRN), which establishes the actual date on which materials are received in the factory. Therefore, in absence of the imported materials, it is implied that the export goods were manufactured out of raw materials, which were not imported under the subject Advance Authorization. Therefore, pre-import condition is violated.

iii) In cases, where multiple input items are allowed to be imported under an Advance Authorization, and out of a set of import items, only a few are imported prior to commencement of export. This implies that in the production of the export goods, except for the item already imported, the importer had to utilize materials other than the duty-free materials imported under the subject Advance Authorization. The other input materials are imported subsequently, **which do not and could not have gone into production of the finished goods exported under the said Advance Authorization**. Therefore, pre-import condition is violated.

iv) In some cases, preliminary imports are made prior to export. Subsequently, exports are effected on a scale which is not commensurate with the imports already made. If the quantum of exports made is more than the corresponding imports made during that period, then it indicates that materials used for manufacture of the export goods were procured otherwise. Rest of the imports are made later which never go into production of the goods exported under the subject Advance Authorization. **It is then implied that the imported materials have not been utilized in entirety for manufacture of the export goods,** and therefore, pre-import condition is violated.

9.3 In the present case, admittedly against all Advance Authorizations, exports were made first. It is established from the copies of the Goods Receipt Notes (GRN), Consumption Register etc, that the goods were exported much before the first lot of finished goods could be produced using the input materials imported duty-free under the respective Advance Authorization. From the tables above, it is evident that even if only the consignment imported under the first Bill of Entry against each Advance Authorization is taken into account, and only the first lot of materials issued to the floor for production is considered, still, the first lot of production was made available to the importer for export, after completion of export obligation to the extent of upto 67% of the total export obligation. Quite naturally, input materials imported subsequently at a later date, couldn't have gone into production of goods, which have already been exported under the respective Advance Authorizations. Therefore, despite having imported the input materials under cover of Bills of Entry which were filed before the first consignment under the concerned Advance Authorization was exported, but record shows explicitly that the goods exported for discharge of export obligation in respect of the impugned Advance Authorizations, were made out of domestic / otherwise procured input materials and the duty free materials imported under the respective Advance Authorization could not have been used for manufacture of the said goods. Therefore, such duty-free imported goods have never been used for the specified purpose of manufacture of goods for export under the respective Advance Authorization. Therefore, in terms of explanation given at Para 9.2(i), 9.2(ii) & 9.2(iv)

above, the importer failed to comply with the pre-import condition and therefore, was not eligible for IGST exemption benefit.

10. Whether the Advance Authorizations issued prior to 13-10-2017 should come under purview of investigation:

10.1 It is but natural that the Advance Authorizations which were issued prior to 13-10-2017, would not and could not contain condition written on the body of the Authorization, that one has to fulfil pre-import condition, for the bare fact that no such pre-import condition was specifically incorporated in the parent notification 18/2015 dated 01-04-2015. The said condition was introduced by the Notification No. 79/2017-Cus dated 13-10-2017, by amending the principal Customs Notification. Therefore, for the Advance Authorizations issued prior to 13-10-2017, logically there was no obligation to comply with the pre-import condition. **At the same time, there was no exemption from the IGST either during that period. Notifications are published in the public domain, and every individual affected by it is aware of what benefit it extends and in return, what conditions are required to be complied with. To avail such benefits extended by the notification, one is duty bound to observe the formalities and/or comply with the conditions imposed in the notification.**

10.2 While issuing the subject Notification, the Government of India instead of imposing a condition that such benefit would be made available for Advance Authorizations issued on and after the date of issuance of the notification, kept the doors wide open for those, who obtained such Advance Authorization in the past too, subject to conditions that such Authorizations are valid for import, and pre-import and physical export conditions have also been followed in respect of those Advance Authorizations. Therefore, instead of narrowing down the benefit to the importers, in reality, it extended benefit to many Advance Authorizations, which could have been out of ambit of the notification, had the date of issue been made the basic criterion for determination of availment of benefit. Further, the notification did not bring into existence any new additional restriction, rather it introduced new set of exemption, which was not available prior to issue of the said notification. **However, as always, such exemptions were made conditional. Even the parent notification, did not offer carte blanche to the importers to enjoy benefit of exemption,** as it also had set of conditions, which were required to be fulfilled to avail such exemption. As such, an act of the Government is in the interest of the public at large, instead of confining such benefits for the Advance Authorizations issued after 13-10-2017, the option was left open, even for the Authorizations, which were issued prior to the issuance of the said notification. **The notification never demanded that the previously issued authorizations have to be pre-import compliant, but definitely, it made it compulsory that benefit of exemption from IGST can be extended to the old Advance Authorizations too, so long, the same are pre-import compliant. The importers did have the option to pay IGST and avail other benefit, as they were doing prior to introduction of the said notification without following pre-import condition.** The moment they opted for IGST exemption, despite being an Advance Authorization issued prior to 13-10-2017, it was necessary for the importer to ensure that pre-import/physical export conditions have been fully satisfied in respect of the Advance Authorization under which they intended to import availing exemption.

10.3 Therefore, it is not a matter of concern whether an Advance Authorization was issued prior to or after 13-10-2017, to ascertain whether the same is entitled for benefit of exemption from IGST, the Advance Authorization should pass the test of complying with both the pre-import and physical export conditions.

11 Whether the Advance Authorizations can be compartmentalized to make it partly compliant to pre-import/ physical export and partly otherwise.

11.1 Advance Authorization Scheme has always been Advance Authorization specific. The goods to be imported/exported, quantity of goods required to be

imported/exported, Value of the goods to be imported/exported, Nos. of items to be allowed to be imported/exported, everything is determined in respect of the Advance Authorization issued. Advance Authorization specific benefits are extended irrespective of the fact whether the importer chooses to import the whole materials at one go or in piece meal. Therefore, such benefit and/or liabilities are not Bills of Entry specific. Present or the erstwhile Policy has never had any provision for issuance of Advance Authorizations, compartmentalizing it into multiple sections, part of which may be compliant with a particular set of conditions and another part compliant with a different set of conditions. Agreeing to the claim of considering part of the imports in compliance with pre-import condition, when it is admitted by the importer that pre-import condition has been violated in respect of an Advance Authorization, would require the Policy to create a new provision, to accommodate such diverse set of conditions in a single Authorization. Neither the present set of Policy nor the Customs notification has any provision to consider imports under an Advance Authorization by hypothetically bifurcating it into an Authorization, simultaneously compliant to different set of conditions. As of now, the Advance Authorizations are embedded with a particular set of conditions only. An authorization can be issued either with pre-import condition or without it. **Law doesn't permit splitting it into two imaginary set of Authorizations, for which requirement of compliances are different.**

11.2 Allowing exemption for part compliance is not reflective in the Legislative intent. For proportional payment of Customs duty in case of partial fulfilment of EO, specific provisions have been made in the Policy, which, in turn has been incorporated in the Customs notification. No such provision has been made in respect of imports w.r.t Advance Authorizations with **"pre-import and physical exports" conditions. In absence of the same, compliance is required in respect of the Authorization as a whole.** In other words, if there are multiple shipments of import & multiple shipments of export, then so long as there are some shipments in respect of which duty-free imports have taken place later & exports corresponding to the same have been done before, then, the pre-import condition stipulated in the IGST exemption notification gets violated. **Once that happens, then even if there are some shipments corresponding to which imports have taken place first & exports made out of the same thereafter, the IGST exemption would not be available, as the benefits of exemption applies to the license as a whole.** Once an Advance Authorization has been defaulted, there is no provision to consider such default in proportion to the offence committed.

11.3 Para 4.49 of the Hand Book of Procedures (2015-20), Volume-I, demands that if export obligation is not fulfilled both in terms of quantity and value, the Authorization holder shall, for the regularization, **pay to Customs authorities, Customs duty on unutilized value of imported/ indigenously procured material along with interest** as notified; which implies that the Authorization holder is legally duty bound to pay the proportionate amount of Customs duty corresponding to the **unfulfilled export obligation.** Customs notification too, incorporates the same provision.

11.4 Para 5.14 (c) of the Hand Book of Procedures, Volume-I, (2015-20) in respect of EPCG Scheme stipulates that where export obligation of any particular block of years is not fulfilled in terms of the above proportions, except in such cases where the export obligation prescribed for a particular block of years is extended by the Regional Authority, such Authorization holder shall, within 3 months from the expiry of the block of years, pay as duties of Customs, an amount that is proportionate to the unfulfilled portion of the export obligation vis-a-vis the total export obligation. In addition to the Customs duty calculatable, interest on the same is payable. Customs notification too, incorporates the same provision.

11.5 Thus. in both the cases, Advance Authorization under Chapter 4 & EPCG under Chapter 5 of the HBPv1, the statutory provisions have been made for payment of duty in

proportion to the unfulfilled EO. This made room for part compliance and has offered for remedial measures. The same provisions have been duly incorporated in the corresponding Customs notifications.

11.6 Contrary to above provisions, in the case of imports under Advance Authorization with pre-import and physical export conditions for the purposes of availing IGST exemptions, **both the Policy as well as the Customs notifications are silent on splitting of an Advance Authorization. This clearly indicates that the legislative intent is totally different in so far as exemption from IGST is concerned. It has not come with a rider allowing part compliance**. Therefore, once vitiated, the IGST exemption would not be applicable on entire imports made under the Authorization.

12 Violations in respect of the Foreign Trade Policy (2015-20) and the condition of the Notification No. 79/2017-Cus dated 13-10-2017 in respect of the imports made by the importer:-

12.1 Customs notification No. 79/2017 dated 13-10-2017, was issued extending benefit of exemption of IGST (Integrated Goods & Service Tax), on the input raw materials, when imported under Advance Authorizations. The original Customs notifications No 18/2015 dated 01-04-2015, that governs imports under Advance Authorizations, has been suitably amended to incorporate such additional benefit to the importers, by introduction of the said notification. It was of course specifically mentioned in the said notification that "the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the **said Customs Tariff Act shall be subject to pre-import condition;"** therefore, for the purpose of availing the benefit of exemption from payment of IGST, one is required to comply with the Pre-import condition. Pre-import condition demands that the entire materials imported under Advance Authorizations should be utilized exclusively for the purpose of manufacture of finished goods, which would be exported out of India. **Therefore, if the goods are exported before commencement of import or even after commencement of exports, by manufacturing such materials out of raw materials which were not imported under the respective Advance Authorization, the Pre-import condition is violated.**

12.2 DGFT Notification No. 33/2015-20 dated 13-10-2017 amended the Para 4.14 of the Foreign Trade Policy (2015-20). It has been clearly stated in the said Para 4.14 of the Policy that-

> *" imports under Advance **Authorisation for physical exports** are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, **and such imports shall be subject to pre-import condition.**"*

Basically, the said notification brought the same changes in the Policy, which have been incorporated in the Customs Notification by the aforementioned amendment.

12.3 From the statement of the authorized representatives of the company, it can be seen that in respect of all Advance Authorizations, they clearly failed to follow the pre-import condition. In all such cases, exports were made by manufacturing goods out of other than duty-free materials imported under the respective Advance Authorizations. First lot of finished goods produced using the duty-free materials, came into being after completion of upto 67% of the total export obligation. Therefore, there was no scope to manufacture the goods, which were already exported towards discharge of export obligation out of the duty-free imported materials, which is in violation of the basic pre-import condition. Records submitted by the importer made it clear that in case of all 05 Advance Authorizations, they exported significant quantity of the goods, even before the production out of the duty-free materials could start. Further, the process of production itself takes 30-31 days' time, and they continued to export even

during the period when finished goods were being subjected to the process of manufacture.

12.4 For the purpose of availing the benefit of exemption from payment of IGST in terms of Para 4.14 of the Foreign Trade Policy (2015-20) and the corresponding Customs Notification No. 79/2017-Cus dated 13-10-2017, it is obligatory to comply with the Pre-import as well as physical export conditions. Therefore, if for reasons as elaborated in section D-3 above, the duty-free materials are not subjected to the process of manufacture of finished goods, which are in turn exported under the subject Advance Authorization, condition of pre-import gets violated. Therefore, in case of all 05 (Five) Advance Authorizations used by the importer as mentioned in Table above, they failed to comply with the pre-import condition rendering them liable to pay IGST.

Combined provisions of the Foreign Trade Policy and the subject Customs Notifications, clearly mandate, only imports under pre-import condition would be allowed with the benefit of such exemption subject to physical exports. **Therefore, no such exemption can be availed, in respect of the Advance Authorizations, against which exports have already been made before commencement of import or where the goods are supplied under deemed exports.** The importer failed to comply with the aforementioned conditions.

13. Violations of the provisions of the Customs Act, 1962:-

13.1 M/s HINDALCO Industries Ltd therefore appears to have contravened the provisions of Section 46 of the Customs Act, 1962, by not declaring while presenting the Bills of Entry for clearance of goods that they did not comply with pre-import and/or physical export condition in respect of the Advance Authorization under which exemption of IGST was sought for. The law demands true facts to be declared by the importer. It was duty of the importer to pronounce that the said pre-import and/or physical exports conditions could not be followed in respect of the subject Advance Authorization. As the importer has been working under the regime of self-assessment, where they have been given liberty to determine every aspect of an imported consignment from classification to declaration of value of the goods, it was sole responsibility of the importer to place correct facts and figures before the assessing authority. In the material case, the importer has failed to comply with the requirements of law and incorrectly availed benefit of exemption of Notification No. 79/2017-Cus dated 13-10-2017. This has therefore, resulted in violation of Section 46 of the Customs Act, 1962.

13.2 The importer failed to comply with the conditions laid down under the relevant Customs as well as DGFT Notifications and the Policy. However, immediately after the failure was brought to their notice, they admitted their failure and paid the entire amount of Customs duty alongwith interest as detailed hereafter. The amount of IGST not paid, is recoverable under Section 28(1) of the Customs Act, 1962.

13.3 With the introduction of self-assessment under the Customs Act, more faith is bestowed on the importer, as the practice of routine assessment, concurrent audit and examination has been dispensed with and the importers have been assigned with the responsibility of assessing their own goods under Section 17 of the Customs Act, 1962. As a part of self-assessment by the importer, it was duty of the importer to present correct facts and declare to the Customs authority about their inability to comply with the conditions laid down in the Customs notification, while seeking benefit of exemption under Notification No. 79/2017-Cus dated 13-10-2017. However, contrary to this, they availed benefit of the subject notification for the subject goods, without complying with the conditions laid down in the exemption notification in violation of Section 17 of the Customs Act, 1962. Amount of Customs duty attributable to such benefit availed in the form of exemption of IGST, is therefore, recoverable from them under Section 28(1) of the Customs Act, 1962.

13.4 The importer failed to comply with the pre-import condition of the notification and imported goods duty free by availing benefit of the same without observing condition, which they were duty bound to comply. This has led to contravention of the provisions of the Notification No. 79/2017-Cus dated 13-10-2017, and the Foreign Trade Policy (2015-20), which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962.

13.5 Section 124 of the Customs Act, 1962, states that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person:

(a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;
(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and
(c) is given a reasonable opportunity of being heard in the matter;

13.6 Therefore, while Section 28 gives authority to recover Customs duty, short paid or not-paid, and Section 110(o) of the Act, hold goods liable for confiscation in case such goods are imported by availing benefit of an exemption notification and the importer fails to comply with and/or observe conditions laid down in the notification, Section 124 & Section 28 of the Customs Act, 1962, authorise the proper officer to issue Show Cause Notice for confiscation of the goods, recovery of Customs duty and imposition of penalty in terms of Section 112(a) of the Customs Act, 1962.

14. ADMISSION:

14.1 In the voluntary statements recorded under Section 108 of the Customs Act, 1962, the authorized representatives of the company admitted having failed to comply with such pre-import condition laid down in the amended Policy as well as the amended Customs notification. However, it was submitted that it was a bonafide mistake. They agreed to pay the entire amount of Customs duty in the form of IGST with interest.

14.2 Accordingly, the importer paid an amount of **Rs 183,10,80,587/- towards IGST, Rs 30, 30, 94, 754/-towards interest vide Challan Nos. as detailed in the Table-10 below**. This amount includes in entirety the amount of IGST involved in respect of the 05 (Five) defaulted Advance Authorizations, i.e.**Rs.183,10,80,587/-**.Although, during recording of the statement, it was stated that the amount of IGST involved was Rs 181, 48, 31, 788/-, but at the time of payment through re-assessment of the respective Bills of Entry, actual liability was found to be **Rs.183,10,80,587/-.** The importer made the entire payment with interest as above. Through their letters dated 27-05-2019 and 16-07-2019, respectively, the importer confirmed about such payment and also forwarded copies of the re-assessed Bills of Entry and corresponding Challans.

14.3 Defaulted Bills of Entry covered by the defaulted Advance Authorizations, were re-called and re-assessed by the concerned Customs House. Amount of IGST so determined, was paid along with appropriate amount of interest calculated by the Customs Authority through system. During investigation, the liability of the importer was also ascertained on the basis of findings of the investigation. It is found that the

liability declared by the authorized representative of the importer are in harmony with the liability so ascertained.

Table-10

Details of payments made

Sr. No.	BOE No.	Date	AA No	AA Date	IGST Paid (Rs)	Interest Paid (Rs)	Challan Number	Challan date
1	5341625	24-Feb-18	3410043690	07-12-2017	93 35 657	11 47 135	2025134690	24-Dec-18
2	4061453	18-Nov-17	3410043633	14-11-2017	6 73 60 825	1 19 03 488	2025135426	4-Jan-19
3	4064630	20-Nov-17	3410043633	14-11-2017	6 67 39 531	1 17 93 698	2025135577	4-Jan-19
4	4064707	20-Nov-17	3410043633	14-11-2017	6 65 56 950	1 17 61 434	2025135507	4-Jan-19
5	4107191	22-Nov-17	3410043633	14-11-2017	5 19 09 205	91 51 664	2025135131	3-Jan-19
6	4327824	9-Dec-17	3410043689	07-12-2017	7 89 14 988	1 29 72 327	2025135670	4-Jan-19
7	4327388	9-Dec-17	3410043689	07-12-2017	6 56 76 703	1 07 96 170	2025133128	4-Jan-19
8	4327823	9-Dec-17	3410043689	07-12-2017	5 85 38 591	95 98 725	2025133042	3-Jan-19
9	4822413	16-Jan-18	3410043689	07-12-2017	5 37 24 913	81 24 973	2025134819	3-Jan-19
10	5084848	6-Feb-18	3410043690	07-12-2017	4 00 51 035	55 46 794	2025135262	3-Jan-19
11	5063199	5-Feb-18	3410043690	07-12-2017	5 58 66 276	77 37 097	2025135739	3-Jan-19
12	5063101	5-Feb-18	3410043690	07-12-2017	5 56 83 426	77 11 773	2024769535	3-Jan-19
13	5341598	24-Feb-18	3410043691	07-12-2017	5 81 88 238	73 89 109	2025133755	3-Jan-19
14	5341628	24-Feb-18	3410043691	07-12-2017	6 80 45 993	86 68 873	2025135789	4-Jan-19
15	5574608	14-Mar-18	3410043691	07-12-2017	6 53 13 519	82 93 922	2025133657	3-Jan-19
16	4327391	9-Dec-17	3410043689	07-12-2017	7 68 00 582	1 26 24 753	2025272183	4-Jan-19
17	4103698	22-Nov-17	3410043633	14-11-2017	11 33 04 141	2 05 80 999	2025135183	16-Jan-19
18	4107194	22-Nov-17	3410043633	14-11-2017	10 91 69 773	1 98 30 016	2024769941	16-Jan-19
19	4428140	16-Dec-17	3410043689	07-12-2017	9 12 52 222	1 54 50 376	2025133379	16-Jan-19
20	5084849	6-Feb-18	3410043690	07-12-2017	9 30 43 122	1 33 82 915	2025135231	16-Jan-19
21	5138614	9-Feb-18	3410043690	07-12-2017	8 36 16 495	1 20 27 030	2025135333	16-Jan-19
22	5508539	9-Mar-18	3410043691	07-12-2017	10 46 66 566	1 38 50 398	2025135832	16-Jan-19
23	4804815	15-Jan-18	3410043690	07-12-2017	8 16 87 040	1 27 90 176	2025272021	16-Jan-19
24	3771190	27-Oct-17	3410043392	17-08-2017	7 34 96 270	1 38 03 204	2025764002	31-Jan-19
25	3975132	13-Nov-17	3410043392	17-08-2017	5 26 73 666	1 33 99 315	2027732953	12-Jul-19

26	3849563	2-Nov-17	3410043392	17-08-2017	8 94 64 861	2 27 58 390	2027733007	12-Jul-19
Grand Total					**183 10 80 587**	**30 30 94 754**		

15. From the facts and discussion hereinabove it appears that:-

a) M/s HINDALCO Industries Ltd availed exemption of Notification No. 79/2017-Cus dated 13-10-2017, in respect of 05 (Five) Advance Authorizations, without complying with the conditions laid down in the said Notification.

b) Notification No. 79/2017-Cus dated 13-10-2017, was issued amending Notification No. 18/2015-Cus dated 01-04-2015, and extending exemption from the payment of IGST for import under Advance Authorizations subject to observance of physical exports and pre-import conditions.

c) The authorized representative of the company tendered his statement under Section 108 of the Customs Act, 1962, and admitted having violated the pre-import condition, which is a pre-requisite for availing the benefit under the subject Notification.

d) The definition of pre-import directly flows from Para 4.03 of the Foreign Trade Policy (2015-20). It demands that Advance Authorizations are issued for import of inputs, which are physically incorporated in the export goods. Pre-import condition requires goods to be imported prior to export and be used in the manufacture of the finished goods, which in turn are to be exported under that very Advance Authorization towards discharge of export obligation.

e) In the present case, in respect of all 05 Advance Authorizations as mentioned in the Table above, exports were made first and also other than duty-free imported materials were used for production of export goods, whereas, finished goods manufactured out of duty-free materials were sold in the domestic market. Therefore, for all such Advance Authorizations pre-import condition was violated.

f) The importer failed to comply with the conditions laid down under the relevant Customs as well as DGFT Notifications and the Policy. However, immediately after the failure was brought to their notice, they admitted their failure and paid the entire amount of Customs duty alongwith interest as detailed above.

g) The importer has paid an amount of **Rs.183,10, 80, 587/- towards IGST and another amount of Rs.30,30,94,754/-towards interest vide Challan Nos. as detailed in the Table-10 above.**

16. In view of the above, Show Cause Notice No. DRI/KZU/CF/ENQ-108 (INT-09)/2018 dated 01.08.2019 issued to M/s HINDALCO Industries Ltd, Aditya Birla Centre, S.K. Ahire Marg, Worli, Mumbai-400030, calling upon to Show Cause in writing to the **Principal Commissioner/Commissioner of Customs, Customs House, Near All India Radio, Navrangpura, Ahmedabad, Gujrat-380009,** as to why:-

a) Duty of Customs amounting to **Rs.183,10,80,587/-** in the form of IGST saved in course of imports of the goods through Dahej Port, under the subject 05 (Five) Advance Authorizations and 26 Bills of Entry as detailed above, in respect of which benefit of exemption under Customs Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, was incorrectly availed, without complying with the obligatory pre-import conditions as stipulated in the said notification, and also for contravening provisions of Para

4.14 of the Foreign Trade Policy (2015-20), should not be demanded and recovered from them under Section 28(1) of the Customs Act, 1962;

b) Subject goods having assessable value of **Rs.3662,16,11,740/-**imported through Dahej Port, under the subject Advance Authorizations **shall not be held liable for confiscation** under Section 111(o) of the Customs Act, 1962, for being imported availing incorrect exemption of IGST in terms of the Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, without complying with obligatory pre-import condition laid down under the said notification;

c) Interest should not be demanded and recovered under Section 28AA of the Customs Act, 1962, from them on such duty of Customs in the form of IGST, benefit of exemption of which was incorrectly availed;

d) Amount of **Rs.183,10,80,587/-**deposited by them towards Customs duty in the form of IGST vide **Challan Nos. as detailed in Table-10**, should not be appropriated towards payment of Customs duty of **Rs 183,10,80,587/-**;

e) Amount of **Rs.30,30,94,754/-deposited** by them towards interest vide **Challan Nos. as detailed in Table-10**, should not be appropriated towards payment of appropriate amount of interest;

f) Penalty should not be imposed upon them under Section 112(a) of the Customs Act, 1962, for improper importation of goods availing exemption under notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, without observance of the pre-import and/or physical export conditions set out in the notification, resulting in non-payment of Customs duty, which rendered the goods liable to confiscation under section 111(o) of the Customs Act, 1962;

g) Bonds executed by them at the time of import should not be enforced in terms of Section 143(3) of the Customs Act, 1962, for recovery of the Customs duty **Rs 183, 10, 80, 587/- and interest thereupon.**

17. Defence Reply submitted by the importer: Importer vide their letter dated submitted the reply to the Show Cause Notice No. DRI/KZU/CF/ENQ-108 (INT-09)/2018/4121-4123 dated 01.08.2019 wherein they interalia stated as under:

17.1 At the outset itself, the importer refute each and every allegation in the SCN and submit that the proposals made in the SCN are totally untenable in law and stated that Additional Director General, DRI does not have jurisdiction to issue the SCN; that referred the definition of 'Proper Officer' defined in Section 2(34) of the Customs Act,1962 and submitted that person who has made assessment under Section 17 is the proper officer to issue Show Cause Notice under Section 28 of the Customs Act and stated that that This proposition also finds support in the judgment of the Supreme Court in Commissioner of Customs vs. Sayed Ali & Anr., reported at 2011 (265) ELT 17(SC); that Section 28 of the Customs Act does not make a reference to a proper officer or any proper officer and referred the decision of Hon'ble Supreme Court in the case of Consolidated Coffee Ltd vs. Coffee Board reported at (1980) 3 SCC 358 that the use of the definite article 'the' is very significant as opposed to 'an' or 'any'; further, they cited the decision Shri Ishar Alloys Steels Ltd vs Jayaswals Neco

Ltd reported at (2001) 3 SCC 609; that exercise of jurisdiction by first officer would oust the jurisdiction of other officers having concurrent jurisdiction and cited the case law of Kenapo Textiles Pvt. Ltd and another vs. State of Haryana and Others reported at 84 STC 88 and V K Ashokan vs. Assistant Commissioner, reported at (2009)14 SCC 85;stated that in case of M/s. Canon India Private Limited versus Commissioner of Customs, 2021 (3) TMI 384, the Hon'ble Apex Court held that Directorate of Revenue Intelligence had no authority in law to issue Show Cause Notice under Section 28(4) of the Customs Act. 1962decision of M/s. Canon India Private Limited versus Commissioner of Customs, 2021 (3) TMI 384; that conferment of concurrent jurisdiction without any guideline is arbitrary, discriminatory and violative of article 14 of Constitution of India and cited the case law of Balaji Rice Company v. CTO [1984] 55 STC 292; that Notification No. 44/2011-Cus. (N.T.), dated July 6, 2011 issued, assigning the functions of the proper officer to various officers does not lay down any such guideline. Therefore, such conferment of concurrent jurisdiction on plurality of officers without guideline is liable to be struck down as held in the above judgment; that there has been no assignment of function of assessment /re-assessment to DRI officers even after the amendment.

17.2 Interpretation of the department is against the object & purpose of AA scheme and would result in redundancy of the scheme; the meaning of the term 'pre-import' has neither been defined under the Customs Notification nor under the FTP; that as per the department, the term pre-import condition means that all the imports of duty-free inputs must take place prior to discharging export obligations; that in other words, the holder of an AA can manufacture finished goods for export and fulfillment of its export obligation only after importing the duty-free materials under the AA scheme and therefore, according to the department, the importers do not have the liberty to export goods manufactured out of raw materials which are domestically procured and are not imported. In support of this interpretation, the department in the impugned SCN has inter-alia, relied upon para 4.1.3 of the FTP which states that inputs imported duty-free must be 'physically incorporated' in export goods. Therefore, it has been alleged that AA scheme has a 'pre-import condition' inbuilt, which must be fulfilled in the circumstances; that this interpretation of the department runs contrary to the object and purpose of the AA scheme and if such an interpretation is accepted, it will result in the AA scheme becoming redundant and otiose; that SCN wrongly relies upon the case of Dharampur Sugar Mill [2015 (321) ELT 0565 (All.)] to conclude that Advance Authorization is not replenishment scheme, however, the product is question in the aforesaid case was sugar which was governed by 'Export Policy' issued under Notification dated 10-9-2004 as well as to the Notification issued on 17-2-2009 and 31-8-2010 for suggesting that the policy of 'grain to grain basis' was applicable on export of sugar; that in the present case, no such policy is applicable in raw materials used to manufacture Final Product thus, the facts of the case are different and principles of Dharampur case (supra) cannot be applied in the instant case; that the department relies on the case of Pennar Industries [TIOL 2015 (162) SC CUS] where the issue was regarding completion of export obligation through third party export; that the assessee had manufactured the goods from the imported inputs, but such manufactured goods were of inferior quality, thus the assessee arranged a third party to manufacture and export the required goods and used it to clear export obligation, however, in the present case the exported goods are manufactured and exported by the Noticees itself and thus, the aforesaid case is not applicable in the instant case; that therefore, it is submitted that pre-import condition hinders the essence of Advance Authorization.

17.3 that the Notification No. 01/2019- Cus dated 10.01.2019 is clarificatory in nature and must be given retrospective effect and interalia stated that they rely on the decision of the Hon'ble Supreme Court in the case of Ralson (India) Limited v. CCE, Chandigarh-I, 2015 (319) ELT 0234 (Supreme Court);reliance also placed on the case of GOI v. Indian Tobacco Association, 2005 (187) ELT 162 (SC), Ruia Cotex Limited v. DGFT, 2017 (347) ELT 263 (Cal.),CCE, Trichy v. Supreme Industries, 2008 (225) ELT

509 (Tri-Chen.); that places reliance on the case of Polyplex Corp Limited v. UOI, 2014 (306) ELT 377 (Allahabad), wherein it was held when a correction is made in a notification though a corrigendum, the same must be given effect from the date of the initial notification;

17.4 They further stated that they have fulfilled the export obligation against all the concerned Advance Authorization and has complied with all the conditions of the Advance Authorization and further interalia stated that Noticee is a law-abiding company and has not violated any provisions of the Customs Act and/or the FTP, as submitted above; that the Noticee has diligently completed all the formalities/requirements required to get an AA. Even at the time of applying for concerned AA and filing of Bills of Entry, the Noticee submitted all the relevant documents and disclosed all the facts true to their knowledge; that though exemption from payment of duties of customs, IGST, etc. are granted by the Customs exemption notification, an AA is issued by the DGFT, and the authorization holder is bound by the conditions laid down in the AA as well the FTP and HBP and submitted that if the DGFT, being the nodal agency, was of the view that the Noticee has violated the so-called 'pre-import condition' of the AA scheme, it would have initiated proceedings against the Noticee under the provisions of FTDR Act, therefore, it is submitted that the interpretation extended by the Customs Department in the SCN is incorrect and fallacious by the very fact that till date, no proceedings has been initiated from the office of the DGFT against the Noticee.

17.5 that without prejudice to the above, quantification of Demand is incorrect in the present case- Advance Authorization can be clubbed to make it partly complaint to Pre-Import Condition and requirement to comply with pre-import Condition should be made qua material-wise and not Advance Authorization-wise and interalia stated that, the Noticee have satisfied the pre-import condition; that In any case, the situation is revenue neutral as IGST is otherwise available as Input Tax Credit under CGST law; that placed reliance on reliance is placed on the decisions of the Hon'ble Supreme Court In Steel Authority of India vs. Collector of Central Excise, 1997 (90) E LT 287, Tvl Kasi and Sethu Vs. The Deputy Commercial tax Officer, 2003 (131) STC 73, In Income Tax Officer Vs. Bachu Lal Kapoor, 1966 (60) ITR 74, CCE Vs. Special Steel Ltd. – 2015 (329) ELT 449 (T);

17.6 that SCN has mis-interpreted the statements of the officials of the Noticee Company and relied upon against the Noticee and further interalia stated that department in Para 12.3, 14.1 and 14.2 has relied upon the statements of various officials of the Noticee Company to contend that the Noticee have admitted having failed to comply with pre-import condition; that statements cannot be relied upon to interpret law; that statements are recorded to discover facts and the same cannot be relied upon to interpret legal provisions; that the pre-import condition is ultra vires and thus not implementable; that Noticee have not violated any other condition specified in FTP and Customs Act.; that no violation of provisions of Customs Act and FTP has been made by the Noticee. Thus, no duty can be recovered under Section 28 (1) of the Customs Act, 1962; that Goods are not liable for confiscation under section 111(o); that in any case, provisions of Section 111 of the Customs Act, 1962 not invocable for goods already cleared; that relied on decision of Bussa Overseas & Properties Vs. C.L. Mahar, ACC – 2004 (163) ELT 304 (Bom.); that penalty is not imposable in the present case; that in the case of Collector of Central Excise V/s H.M.M. Limited reported in1995 (76) ELT 497 (SC),Hon'ble Supreme Court held that, the question of Penalty would arise only if the Department is able to sustain the demand; Similarly, in the case of Commissioner of Central Excise, Aurangabad V/s Balakrishna Industries reported in 2006 (201) ELT 325 (SC),Hon'ble Supreme Court held that, Penalty is not imposable when differential duty is not payable; that the conduct of the Noticee was totally bonafide and noticee neither had any intention to evade payment of duty, nor had any knowledge of the liability of the goods to confiscation; that the noticee cleared the Bills of Entry filed post investigation on

payment of IGST which shows that the noticee had no ill intention of evading the duty and that they disclosed all the information best to their knowledge; that in the absence of any malafide on the part of the Noticee, no penalty is imposable and relied on the case of Hindustan Steel Ltd. v. State of Orissa[1978 (2) ELT (J159) (SC)], wherein Hon'ble Supreme Court held that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bonafide belief that it is submitted that the conduct of the Noticee in the present case was totally bonafide and therefore no penalty is imposable; that no Penalty can be Imposed under Section 112 (a) of the Customs Act, 1962; that Penalty not imposable in cases involving "Interpretation." ; further, placed reliance on the case of Mahindra & Mahindra v. Union of India, 2022 (10) TMI 212 affirmed by the Supreme Court vide Order dated 28.07.2023 wherein penalty and interest demanded was set aside in the absence of provision under Section of Additional Duty of Section 3A for Special Additional Duty under the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 that created a charge in nature of penalty or interest; that Interest is not leviable that no interest is imposable in view of the law laid down by Hon'ble Bombay High Court in Mahindra & Mahindra Limited v. Union of India, 2022 (10) TMI 212 affirmed by Supreme Court vide Order dated 28.07.2023, since 3(12) of Customs Tariff Act, 1975 does not borrow penalty/ interest leviable under provisions of Customs Act, 1962; that in the case of Bajaj Health & Nutritional Pvt. Ltd. v. CC, Chennai, 2004 (166) E.L.T. 189, the tribunal set aside the interest and penalty on evasion of anti-dumping duties on the reasoning that the provisions of Customs Act, 1962 relating to non-levy, short-levy, and refunds were borrowed only for the purpose of chargeability of anti-dumping duty under Section 9A(8) of Customs Tariff Act, 1975 and the provisions of the Customs Act relating to confiscation, interest and penalty were not borrowed; and prayed that proceedings initiated vide SCN F. No. DRI/KZU/CF/ENQ-108(INT-09)/2018/4121 dated 01.08.2019 is not sustainable and is liable to be dropped herewith; amount already paid by the Noticee amounting to Rs. 183,10,80,587/- towards IGST and amount of Rs 30,30,94,754/- towards interest may be refunded; the Bond executed by the Noticee at the time of filing of Disputed Bills of Entry may be released; any other suitable order as deem fit may be passed so as to grant complete relief to the Noticee in the interest of justice.

18. Personal Hearing: The Personal Hearing was fixed on 05.02.2024for M/s. Hindalco Industries Limited. Shri Ghanshyam Chudasama, Dy. General Manager M/s. Hindalco Industries Limited and Shri Manish Jain Advocate of Importer attended the Personal Hearing on 05.12.2023 wherein they reiterated their written submission dated 05.02.2024.

19. Findings: I have carefully gone through the Show Cause Notice dated 01.08.2019 written submission dated 05.02.2024 filed by M/s. Hindalco Industries Limited and records of personal hearing held on 05.02.2024.

20. I find from the records that the present Show Cause Notice dated 01.08.2019 has been retrieved from Call Book for adjudication in view of Hon'ble Supreme Court's decision dated 28.04.2023 in case of M/s. Cosmo Films Ltd. I also find that after issuance of Show Cause Notice on01.08.2019, the importer was informed vide letter F. No. VIII/10-64/Pr. Commr./O&A/2019 dated 23.01.2020 the reason for transfer of Show Cause Notice to Call Book as stipulated under Sub –Section 9A of Section 28 of the Customs Act, 1962. Further, Chief Commissioner of Customs, extended the time limit for further six months under Section 28 (9) of the Customs Act, 1962 and the importer was informed about the same vide letter dated 18.01.2024.

21. The issues for consideration before me in the present SCN are as under:-

(i) Whether, the importer, during October13,2017 to January 9,2019 was eligible for availing exemption under Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-

2017 on inputs imported under Advance Authorizations without fulfillment of mandatory 'Pre Import Condition'?

(ii) Whether the Duty of Customs amounting to Rs. 183,10,80,587/- (Rupees One Hundred Eighty Three Crore, Ten Lakh, Eighty Thousand, Five Hundred and Eighty Seven only) as detailed in Show Cause Notice is required to be demanded and recovered from them under Section 28(1) of the Customs Act,1962 alongwith Interest under Section 28AA of the Customs Act, 1962?

(iii) Whether, subject goods having assessable value of Rs 36,62,16,11,740/- (Rupees Three Thousand Six Hundred Sixty Two Crore, Sixteen Lakh, Eleven Thousand, Seven Hundred and Forty only) as detailed in Show Cause Notice, are liable for confiscation under Section 111(o) of the Customs Act, 1962?

(iv) Whether the Duty of Customs amounting to Rs. 183,10,80,587/- (Rupees One Hundred Eighty Three Crore, Ten Lakh, Eighty Thousand, Five Hundred and Eighty Seven only) deposited by them towards Customs Duty in the form of IGST vide Challan mentioned in Table-10 of the SCN should be appropriated towards payment of Customs Duty of Rs. 183,10,80,587/-?

(v) Whether amount of Rs. 30,30,94,754/- deposited by them towards interest vide Challan Nos. as detailed in Table-10 of the SCN, should be appropriated towards payment of amount of interest?

(iv) Whether the noticee is liable to penalty under Section 112(a) of the Customs Act, 1962?

(vi) Whether Bonds executed by them at the time of import is enforceable in terms of Section 143(3) of the Customs Act, 1962, for recovery of the Customs Duty as mentioned above alongwith interest?

22. I find that Duty liability with interest and penal liabilities would be relevant only if the bone of the contention that whether the Importer has violated the mandatory pre-import condition as stipulated in Notification No.79/2017-Cus, dated 13.10.2017 is answered in the affirmative. Thus, the main point is being taken up firstly for examination.

23. Genesis of Pre Import Condition:

23.1 Before proceeding for adjudication of the Show Cause Notice, let us firstly go through relevant provisions which will give genesis of 'Pre Import Condition'.

23.1.1Relevant Para 4.03 of the Foreign Trade Policy (2015-20) inter-alia states that :-

An Advance Authorisation is issued to allow duty free import of inputs, which are physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, energy, catalysts which are consumed/ utilised to obtain export product, may also be allowed. DGFT, by means of Public Notice, may exclude any product(s) from purview of Advance Authorisation.

23.1.2 Relevant Para 4.13 of the Foreign Trade Policy (2015-20) inter-alia states that :-

4.13 Pre-import condition in certain cases-

(i) DGFT may, by Notification, impose pre-import condition for inputs under this Chapter.

(ii) Import items subject to pre-import condition are listed in Appendix 4-J or will be as indicated in Standard Input Output Norms (SION).

23.1.3Relevant Para 4.14 of the Foreign Trade Policy (2015-20) inter-alia states that :-

4.14 Details of Duties exempted-

Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorisation for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition. Imports against Advance Authorisations for physical exports are exempted from Integrated Tax and Compensation Cess upto 31.03.2018 only.

23.1.4 NOTIFICATION NO. 31 (RE-2013)/ 2009-2014 dated 1st August, 2013:

In exercise of powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No.22 of 1992) read with paragraph 1.2 of the Foreign Trade Policy, 2009-2014, the Central Government hereby notifies the following amendments in the Foreign Trade Policy (FTP) 2009-2014.

2. After para 4.1.14 of FTP , a new para 4.1.15 is inserted.

"4.1.15 Wherever SION permits use of either (a) a generic input or (b) alternative inputs, unless the name of the specific input(s) [which has (have) been used in manufacturing the export product] gets indicated / endorsed in the relevant shipping bill and these inputs, so endorsed, match the description in the relevant bill of entry, the concerned Authorisation will not be redeemed. In other words, the name/description of the input used (or to be used) in the Authorisation must match exactly the name/description endorsed in the shipping bill. At the time of discharge of export obligation (EODC) or at the time of redemption, RA shall allow only those inputs which have been specifically indicated in the shipping bill."

3. Para 4.2.3 of FTP is being amended by adding the phrase "4.1.14 and 4.1.15" in place of "and 4.1.14". The amended para would be as under:

"Provisions of paragraphs 4.1.11, 4.1.12, 4.1.13, 4.1.14 and 4.1.15 of FTP shall be applicable for DFIA holder."

4. ***Effect of this Notification:*** *Inputs actually used in manufacture of the export product should only be imported under the authorisation.* ***Similarly inputs actually imported must be used in the export product. This has to be established in respect of every Advance Authorisation / DFIA.***

23.2 With the introduction of GST w.e.f 01-07-2017, Additional Duties of Customs (CVD & SAD) were subsumed into the newly introduced Integrated Goods and Service Tax (IGST). Therefore, at the time of imports, in addition to Basic Customs Duty, IGST was made payable instead of such Additional Duties of Customs. Accordingly, Notification No.26/2017-Customs dated 29 June 2017, was issued to give effect to the changes introduced in the GST regime in respect of imports under Advance Authorization. The corresponding changes in the Policy were brought through Trade Notice No.11/2018 dated 30-06-2017. I find that it is pertinent to note here that while in pre-GST regime blanket exemption was allowed in respect of all Duties leviable when goods were being imported under Advance Authorizations, contrary to that, in post-GST regime, for imports under Advance Authorization, the importers were required to pay such IGST at the time of imports and then they could get the credit of the same.

However, subsequently, the Government decided to exempt imports under Advance Authorizations from payment of IGST, by introduction of the Customs Notification No.79/2017 dated 13-10-2017. However, such exemption from the payment of IGST was made conditional. The said Notification No.79/2017 dated 13-10-2017, was issued with the intent of incorporating certain changes/ amendment in the principal Customs Notifications, which were issued for extending benefit of exemption to the goods when imported under Advance Authorizations.

23.2.1 D.G.F.T. Notification No. 33/2015-2020 dated 13.10.2017 amended the provisions of Para 4.14 of the Foreign Trade Policy 2015-20 which read as under:

Para 4.14 is amended to read as under:

"**4.14: Details of Duties exempted**

Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorization for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and **such imports shall be subject to pre-import condition.**"

23.2.2 Notification No.-79/2017 - Customs, Dated: 13-10-2017. The relevant amendment made in Principal Notification No. 18/2015-Customs dated 01.04.2015 vide Notification No. 79/2017 - Customs, Dated: 13-10-2017 is as under:

-: Table:-

S. No.	*Notification number and date*	*Amendments*
(1)	*(2)*	*(3)*
1	.....	.....
2.	*18/2015-Customs, dated the 1 st April, 2015 [vide number G.S.R. 254 (E), dated the 1 st April, 2015]*	*In the said notification, in the opening paragraph,-* *(a) .....* *(b) in condition (viii), after the proviso, the following proviso shall be inserted, namely:-* *"Provided further that notwithstanding anything contained hereinabove for the said authorisations where the exemption from integrated tax and the goods and services tax compensation cessleviable thereon under sub-section (7) and sub-section (9)* ***of section 3 of the said Customs Tariff Act, has been availed, the export obligation shall be fulfilled by physical exports only;";*** *(c) ....*

		(c) after condition (xi), the following conditions shall be inserted, namely :- *"(xii) that the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section* ***3 of the said Customs Tariff Act shall be subject to pre-import condition;***

23.3 Further, I find that Notification No.01/2019-Cus. dated 10.01.2019 removed/omitted the 'Pre Import condition' laid down vide Amendment Notification No. 79/2017- Cus dated 13.10.2017 in the Principal Notification No. 18/2015-Cus dated 01.04.2015.

23.4 The High Court of Madras (Madurai Bench) in the case of M/s Vedanta Ltd reported as 2018 (19) G.S.T.L. 637 (Mad.)on the issue under consideration held that:-

> ***"pre-import simply means import of raw materials before export of the finished goods to enable the physical export and actual user condition possible and negate the revenue risk that is plausible by diverting the imported goods in the local market".***

23.5 I find that the Importer has taken plea that meaning of phrase 'Pre-import Condition' was neither defined in the FTP policy nor in the notification. I find that 'Pre-Import Condition' is unambiguous word/phrase. Further, I find that the definition of pre-import directly flows from Para 4.03 of the Foreign Trade Policy (2015-20)[erstwhile Para 4.1.3 of the Policy (2009-14)] wherein it is said that Advance Authorizations are issued for import of inputs, which are physically incorporated in the export goods allowing legitimate wastage. Thus, this Para specifically demands for such physical incorporation of imported materials in the export goods. And the same is only possible, when imports are made prior to export. Therefore, such Authorizations principally do have the pre-import condition in-built, which is required to be followed. In the instant case, it is undisputed fact that the Importer has not complied with the Pre-Import Condition as laid down vide Exemption Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017.

23.6 Further, I find that this issue is no longer *res-Integra* in as much as Hon'ble Supreme Court in the case of Union of India Vs. Cosmo Films Ltd reported as 2023 (72) GSTL 147 (SC) has overruled judgment of Hon'ble High Court of Gujarat and has held that pre-import condition, during 13.10.2017 **to 09.01.2019**, in Advance Authorization Scheme was valid. Relevant Paras of the decision are as under:

> **69.**The object behind imposing the 'pre-import condition' is discernible from Paragraph 4.03 of FTP and Annexure-4J of the HBP; that only few articles were enumerated when the FTP was published, is no ground for the exporters to complain that other articles could not be included for the purpose of 'pre-import condition'; as held earlier, that is the import of Paragraph 4.03(i). The numerous schemes in the FTP are to maintain an equilibrium between exporters' claims, on the one hand and on the other hand, to preserve the Revenue's interests. Here, what is involved is exemption and postponement of exemption of IGST, a new levy altogether, whose mechanism was being worked out and evolved, for the first time. The plea of impossibility to fulfil 'pre-import conditions' under old AAs was made, suggesting that the notifications retrospectively mandated new conditions. The exporter respondents' argument that there is no *rationale* for differential treatment of BCD and IGST under AA scheme is without merit. BCD is a customs levy at the point of import. At that stage, there is no question of credit. On the

other hand, IGST is levied at multiple points (including at the stage of import) and input credit gets into the stream, till the point of end user. As a result, there is justification for a separate treatment of the two levies. IGST is levied under the IGST Act, 2017 and is collected, for convenience, at the customs point through the machinery under the Customs Act, 1962. The impugned notifications, therefore, cannot be faulted for arbitrariness or under classification.

70. The High Court was persuaded to hold that the subsequent notification of 10-1- 2019 withdrew the 'pre-import condition' meant that the Union itself recognized its unworkable and unfeasible nature, and consequently the condition should not be insisted upon for the period it existed, *i.e.*, after 13-10-2017. This Court is of the opinion that the reasoning is faulty. It is now settled that the FTPRA contains no power to frame retrospective regulations. Construing the later notification of 10-1-2019 as being effective from 13-10-2017 would be giving effect to it from a date prior to the date of its existence; in other words the Court would impart retrospectivity. In *Director General of Foreign Trade &Ors.vKanak Exports &Ors.* [2015 (15) SCR 287 = 2015 (326) E.L.T. 26 (S.C.)] this Court held that :

"Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective. No doubt, this Section confer powers upon the Central Government to 'amend' the policy which has been framed under the aforesaid provisions. However, that by itself would not mean that such a provision empowers the Government to do so retrospective."

71. To give retrospective effect, to the notification of 10-1-2019 through interpretation, would be to achieve what is impermissible in law. Therefore, the impugned judgment cannot be sustained on this score as well.

75. *For the foregoing reasons, this court holds that the Revenue has to succeed. The impugned judgment and orders of the Gujarat High Court are hereby set aside. However, since the respondents were enjoying interim orders, till the impugned judgments were delivered, the Revenue is directed to permit them to claim refund or input credit (whichever applicable and/or wherever customs duty was paid). For doing so, the respondents shall approach the jurisdictional Commissioner, and apply with documentary evidence within six weeks from the date of this judgment. The claim for refund/credit, shall be examined on their merits, on a case-by-case basis. For the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular, in this regard."*

23.7 I find that based on the decision of Hon'ble Supreme Court in aforesaid case of Union of India Vs. Cosmo Films Ltd, CBIC issued Circular No. 16/2023-Cus dated 07.06.2023 which is reproduced as below:

Import — Pre-import condition incorporated in Foreign Trade Policy and Handbook of Procedures 2015-20 — Availing exemption from IGST and GST Compensation Cess — Implementation of Supreme Court direction in Cosmo Films case

M.F. (D.R.) Circular No. 16/2023-Cus., dated 7-6-2023

F. No. 605/11/2023-DBK/569

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Indirect Taxes & Customs, New Delhi

Subject : Implementation of Hon'ble Supreme Court direction in judgment dated 28-4-2023 in matter of Civil Appeal No. 290 of 2023 relating to 'pre-import condition' - Regarding.

Attention is invited to Hon'ble Supreme Court judgment dated 28-4-2023 in matter of Civil Appeal No. 290 of 2023 (*UOI and others* v. *Cosmo Films Ltd.*) [(2023) 5 Centax 286 (S.C.) = 2023 (72) G.S.T.L. 417 (S.C.)] relating to mandatory fulfilment of a 'pre-import condition' incorporated in para 4.14 of FTP 2015-20 *vide* the Central Government (DGFT) Notification No. 33/2015-20, dated 13-10-2017, and reflected in the Notification No. 79/2017-Customs, dated 13-10-2017, relating to Advance Authorization scheme.

2. The FTP amended on 13-10-2017 and in existence till 9-1-2019 had provided that imports under Advance Authorization for physical exports are also exempt from whole of the integrated tax and compensation cess, as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition.

3. Hon'ble Supreme Court has allowed the appeal of Revenue directed against a judgment and order of Hon'ble Gujarat High Court [2019 (368) E.L.T. 337 (Guj.)] which had set aside the said mandatory fulfilment of pre-import condition. As such, this implies that the relevant imports that do not meet the said pre-import condition requirements are to pay IGST and Compensation Cess to that extent.

4. While allowing the appeal of Revenue, the Hon'ble Supreme Court has however directed the Revenue to permit claim of refund or input credit (whichever applicable and/or wherever customs duty was paid). For doing so, the respondents shall approach the jurisdictional Commissioner, and apply with documentary evidence within six weeks from the date of the judgment. The claim for refund/credit, shall be examined on their merits, on a case-by-case basis. For the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular in this regard.

5.1 The matter has been examined in the Board for purpose of carrying forward the Hon'ble Supreme Court's directions. It is noted that -

(a) ICES does not have a functionality for payment of customs duties on a bill of entry (BE) (unless it has been provisionally assessed) after giving the Out-of-Charge (OOC) to the goods. In this situation, duties can be paid only through a TR-6 challan.

(b) Under GST law, the BE for the assessment of integrated tax/ compensation cess on imports is one of the documents based on which the input tax credit may be availed by a registered person. A TR-6 challan is not a prescribed document for the purpose.

(c) The nature of facility in Circular No. 11/2015-Cus. (for *suo motu* payment of customs duty in case of *bona fide* default in export obligation) [2015 (318) E.L.T. (T11)] is not adequate to ensure a convenient transfer of relevant details between Customs and GSTN so that ITC may be taken by the importer.

(d) The Section 143AA of the Customs Act, 1962 provides that the Board may, for the purposes of facilitation of trade, take such measures for a class of importers-exporters or categories of goods in order to, *inter alia*, maintain transparency in the import documentation.

5.2 Keeping above aspects in view, noting that the order of the Hon'ble Court shall have bearing on importers others than the respondents, and for purpose of carrying

forward the Hon'ble Court's directions, the following procedure can be adopted at the port of import (POI) :-

(a) **for the relevant imports that could not meet the said pre-import condition and are hence required to pay IGST and Compensation Cess to that extent, the importer (not limited to the respondents) may approach the concerned assessment group at the POI with relevant details for purposes of payment of the tax and cess along with applicable interest.**

(b) the assessment group at POI shall cancel the OOC and indicate the reason in remarks. The BE shall be assessed again so as to charge the tax and cess, in accordance with the above judgment.

(c) the payment of tax and cess, along with applicable interest, shall be made against the electronic challan generated in the Customs EDI System.

(d) on completion of above payment, the port of import shall make a notional OOC for the BE on the Customs EDI System [so as to enable transmission to GSTN portal of, *inter alia*, the IGST and Compensation Cess amounts with their date of payment (relevant date) for eligibility as per GST provisions].

(e) the procedure specified at (a) to (d) above can be applied once to a BE.

6.1 Accordingly, the input credit with respect to such assessed BE shall be enabled to be available subject to the eligibility and conditions for taking input tax credit under Section 16, Section 17 and Section 18 of the CGST Act, 2017 and rules made thereunder.

6.2 Further, in case such input tax credit is utilized for payment of IGST on outward zero-rated supplies, then the benefit of refund of such IGST paid may be available to the said registered person as per the relevant provisions of the CGST Act, 2017 and the rules made thereunder, subject to the conditions and restrictions provided therein.

7. The Chief Commissioners are expected to proactively guide the Commissioners and officers for ironing out any local level issues in implementing the broad procedure described in paras 5 and 6 above and ensuring appropriate convenience to the trade including in carrying out consequential actions. For this, suitable Public Notice and Standing Order should be issued. If any difficulties are faced that require attention of the Board, those can be brought to the notice.

23.8 Further, I find that DGFT have issued Trade Notice No. 7/2023-24 dated 08.06.2023, saying that "all the imports made under Advance Authorization Scheme on or after 13.10.2017 and upto and including 09.01.2019 which could not meet the pre-import condition may be regularized by making payments as prescribed in the Customs Circular".

23.9 Thus, from the findings and discussion in Para 23 to 23.8 above, I find that there is no dispute that the said importer has failed to comply with the mandatory conditions of 'Pre-Import' while claiming the benefit of Exemption from IGST and Compensation Cess under Exemption Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017 during the period from October13, 2017 to January 9,2019, in Advance Authorization Scheme.

23.10. I find that importer's plea that they have not violated the condition in FTP and Customs Act and pre-import condition is ultra vires and thus not implementable is not acceptable as the Hon'ble Supreme Court in the case of Union of India Vs. Cosmo Films Ltd reported as 2023 (72) GSTL 147 (SC) have discussed exhaustively the

provisions of the Customs Act as well as the provisions of the FTP and it has been held that pre import conditions is required to be complied with.

23.11 I find that the said importer has reiterated their contention that the Pre Import condition laid down vide amendment Notification No. 79/2017-Cus, dated 13-10-2017 in exemption Notification No. No.18/2015 dated 01-04-2015, is arbitrary and further Notification No. 01/2019 –Cus dated 10.01.2019 whereby the Pre Import conditions omitted is having retrospective effect. I find that aforesaid issue were contended before the Hon'ble Gujarat High Court in case of Maxim Tubes Company Pvt. Ltd. v. Union of India reported as 2019 (368) E.L.T. 337 (Guj.). I find that discussing all the aforesaid issue, Hon'ble Supreme Court has turned down this decision of Maxim Tubes Company Pvt. Ltd. v. Union of India in case of Union of India Vs. Cosmo Film Ltd.

24. Whether the Duty of Customs amounting to Rs. 183,10,80,587/-(Rupees One Hundred Eighty Three Crore, Ten Lakh, Eighty Thousand, Five Hundred and Eighty Seven only) as detailed in Table-10 of the SCN is required to be demanded and recovered from them under Section 28(1) of the Customs Act, 1962 alongwith interest under Section 28AA of the Customs Act, 1962 and whether Bonds executed by Importer at the time of import should be enforced in terms of Section 143(3) of the Customs Act, 1962, for recovery of the Customs Duty alongwith interest?

24.1 I find that it would be worth to reiterate that the Hon'ble Supreme Court in case of Union of India Vs. Cosmo Films Ltd has overruled judgment of Hon'ble Gujarat High Court and has held that pre-import conditions, during October13, 2017 to January 9,2019, in Advance Authorization Scheme was valid. Thus, I find that the Hon'ble Supreme Court has settled that IGST and Compensation Cess involved in the Bills of Entry filed during October13, 2017 to January 9,2019 is required to be paid on failure to compliance of 'Pre Import Condition as stipulated under Exemption Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017. I find that it is undisputed fact that said Importer has failed to fulfill and comply with 'Pre Import condition' incorporated in the Foreign Trade Policy of 2015-2020 and Handbook of Procedures 2015-2020 by DGFT Notification No. 33/2015-20 and Customs Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017. Further, I find that Importer is well aware of the rules and regulation of Customs as well as Exim Policy as they are regularly importing the goods under Advance Authorisation and they were fully aware that the goods being cleared from Customs was not fulfilling pre import condition as they have already filed the Shipping Bill to this effect and goods have already been exported. Thus, it proves beyond doubt that goods imported under subject Bills of Entry were never used in the goods already exported. Thus, I find that the Importer is liable to pay the differential Customs Duty amounting to **Rs. 183,10,80,587/-**as proposed under Section 28 (1) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act,1962.

24.2 Further, without prejudice to the demand under Section 28 (1) of the Customs Act,1962, I find that in the present case, the importer has also filed Bond under Section 143 of the Customs Act, for the clearance of imported goods under Advance Authorization availing the benefit of exemption under Customs Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017. Sub Section (1) of Section 143 explicitly says that *"Where this Act or any other law requires anything to be done before a person can import or export any goods or clear any goods from the control of officers of customs and the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] is satisfied that having regard to the circumstances of the case, such thing cannot be done before such import, export or clearance without detriment to that person, the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may, notwithstanding anything contained in this Act or such other law, grant leave for such import, export or clearance on the*

person executing a bond in such amount, with such surety or security and subject to such conditions as the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] approves, for the doing of that thing within such time after the import, export or clearance as may be specified in the bond". On perusal of one of the Bonds filed by the Importer, I find that conditions are explicitly mentioned in Bond . The wording and condition of Bond inter alia is reproduced below:

"WHEREAS we, the obligor (s) have imported the goods listed in annexure-1 availing customs duty exemption in terms of the notification of the Government of India in Ministry of Finance (department of revenue) **No.18/2015 dated 01.04.2015** (hereinafter referred to as the said Notification) against the Advance License No. **3410043690 dated 07.12.2017** (hereinafter as the license) for the import of the goods mentioned there in on the terms and conditions specified in the **said notification** and licence.

NOW THE CONDITIONS OF THE ABOVE BOND ARE THAT:-

1. I/We, the obligor(s) shall observe all the terms & conditions of the said notification ;

2.We the obligor(s) shall observe all the terms and conditions specified in the licence.

3....

4...

5.We, the obligor(s), shall comply with the conditions stipulated in the said Foreign Trade Policy as amended from time to time.

6....

It is hereby declared by us, the obligor(s) and the Government as follows:-

1. The above written Bond is given for the performance of an act in which the public are interest.

2.The Government through the commissioner of customs or any other officer of the Customs recover the same due from the Obligor(s) in the manner laid sub-section (1)of the section 142 of the customs act,1962."

24.3 I find that no time limit is prescribed for recovery of any liability in case of Bond filed under Section 143 (1) of the Customs Act,1962 as it is continuous liability on the part of the importer to follow the conditions prescribed in the Bond. I find that the said importer is obliged to follow the conditions of the Bond. Therefore, I find that by filing the Bond under Section 143, said Importer is obliged to pay the consequent duty liabilities along with interest on non compliance/failure to fulfill the conditions of the Notification. Therefore, I find that without prejudice to the time limit envisaged under Section 28 (1) of the Customs Act, 1962, said Importer is liable to pay differential duty alongwith interest without any time limit. Therefore, I find that without prejudice to the Provisions of Section 28 (1) of the Customs Act,1962, the Bond is required to be enforced under Section 143 (3) of the Customs Act, 1962 for the recovery of differential Customs Duty **Rs. 183,10,80,587/-**alongwith interest.

24.4 I find that the importer has paid the differential Customs Duty of Rs. 183,10,80,587/- alongwith interest of Rs. 30,30,94,754/- under protest and contested that Duty and interest is not liable to be paid and relied on the decision of Hon'ble Mumbai High Court in case of Mahindra & Mahindra v. Union of India, 2022 (10) TMI 212 wherein penalty and interest demanded was set aside in the absence of

provision under Section 3 for Additional Duty of Customs, Section 3A for Special Additional Duty under the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 that created a charge in nature of penalty or interest.

24.5 I find that, it is not in dispute that the importer had imported the goods claiming the benefit of Notification No. 18/2015 dated 01.04.2015 under Advance Authorization. Condition (iv) of the Notification No.18/2015 dated 01.04.2015 says that "(iv) that in respect of imports made before the discharge of export obligation in full, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen per cent per annum from the date of clearance of the said materials;".

24.6 Further, I find that importer has placed reliance on the decision of Hon'ble Mumbai High Court rendered in case of Mahindra & Mahindra v. Union of India, wherein the SLP filed before the Hon'ble Supreme Court by the Department is dismissed. Relying on the said decision of Hon'ble Mumbai High Court, Importer contended that in absence of interest and penalty provision under Section 3 for Additional Duty of Customs and Section 3A for Special Additional Duty under the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 ,same cannot be levied. I find that this contention is not acceptable as the said decision is with regard to pre-GST era. Period covered in the said decision was November'2004 to January'2007 and period covered in present case is 13.10.2017 to 09.01.2019. Said decision of Mahindra & Mahindra Ltd reported in (2023) 3 Centax 261 (Bom.) relied on by the importer is distinguishable on following grounds.

- In the instant case, IGST has been demanded under Section 28 of the Customs Act, 1962 as well as by enforcement of Bond under Section 143 of the Customs Act, 1962. In this case, the importer has executed Bond before the proper officer binding himself to pay duty alongwith interest in case the importer fails to comply with the condition of Bond. As the importer failed to fulfil the condition of the bond i.e failed to comply with mandatory 'pre-import' condition specified under the Notification, therefore, the importer is liable to pay duty alongwith interest in terms of the conditions of the Bond as specified under Section 143 of the Customs Act, 1962.

  In the case of Mahindra & Mahindra Ltd, no such Bond was executed before the proper officer.

- In the case of Mahindra & Mahindra Ltd, the issue under dispute was charging Section for interest and penalty. According to Deptt., the charging Section for imposition of CVD, SAD & Surcharge was Section 12 of the Customs Act, 1962. Hon'ble Court held that charging section for imposition of CVD, SAD & Surcharge was Section 3(1) of Customs Tariff Act, 1975, Section 3(A) of Customs Tariff Act, 1975 and Section 19 (1) of the Finance Act,2000 respectively which did not have provisions for imposition of penalty and interest.

  In the instant case, the demand of IGST has been made in terms of provision of IGST Act, 2017 and the charging Section for IGST on import is Section 5(1) of the IGST Act, 2017, Relevant Para of Section 5(1) of the IGST Act, 2017 is re produced as under:

  "SECTION 5. Levy and collection.

  (1) .....

Provided that the integrated tax on goods *[other than the goods as may be notified by the Government on the recommendations of the Council]* imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962)."

- Hon'ble Supreme Court in the case of Cosmo Films Ltd has held that ***"IGST is levied under the IGST Act, 2017 and is collected, for convenience, at the customs point through the machinery under the Customs Act, 1962."***

24.7 I also find that Hon'ble Supreme Court on 11-3-2016 **dismissed** Civil Appeal filed by Atul Kaushik (Oracle India Ltd) reported in *Oracle India Pvt. Ltd.* v. *Commissioner - 2016 (339) E.L.T. A136 (S.C.)]* against the CESTAT Final Order Nos. A/52353-52355/2015-CU(DB) dated 29-7-2015 as reported in **2015 (330) E.L.T. 417 (Tri.-Del.)** (Atul Kaushik v. Commissioner) holding that " We see no reason to interfere with the impugned order passed by Customs, Excise & Service Tax Appellate Tribunal". Relevant Para of the decision of Final Order Nos. A/52353-52355/2015-CU(DB) dated 29-7-2015 of CESTAT reported in **2015 (330) E.L.T. 417 (Tri.-Del.)** (Atul Kaushik v. Commissioner) is re-produced as under:

"16. *The appellants have also contended that penalty, interest and confiscation cannot be invoked in respect of evasion of countervailing duty (levied under Section 3 of the Customs Tariff Act, 1975) on the ground that the provisions relating to these aspects have not been borrowed into Section 3 of the Customs Tariff Act, 1975. In support of the principle that the penalty cannot be levied in the absence of penalty provision having been borrowed in a particular enactment, the appellants cited the judgments in the case of Khemka & Co. (supra) and Pioneer Silk Mills Pvt. Ltd. (supra). We are in agreement with this proposition and therefore we refrain from discussing the said judgments. The appellants also cited the judgment in the case of Supreme Woollen Mills Ltd. (supra), Silkone International (supra) and several others to advance the proposition that penalty provisions of Customs Act were not applicable to the cases of non-payment of anti-dumping duty and that the same principle is applicable with regard to leviability of interest [India Carbon Ltd. (supra) and V.V.S. Sugar (supra)]. We have perused these judgments. Many of them dealt with Anti-dumping duty/Special Additional Duty (SAD) leviable under various sections (but not Section 3) of Customs Tariff Act, 1975 and in those sections of the Customs Tariff Act, 1975 or in the said Act itself, during the relevant period, there was no provision to apply to the Anti-dumping duty/SAD the provisions of Customs Act, 1962 and the rules and regulations made thereunder including those relating to interest, penalty, confiscation. In the case of Pioneer Silk Mills (supra), the duty involved was the one levied under the Additional Duties of Excise. (Goods of Special Importance) Act, 1957 and its Section 3(3) only borrowed the provisions relating to levy and collection from the Central Excise Act, 1944 and in view of that it was held that the provisions relating to confiscation and penalty could not be applied with regard to the duties collected under the said Act of 1957. None of these judgments actually deal with the CVD levied under Section 3 of the Customs Tariff Act, 1975. The impugned countervailing duty was levied under Section 3 of Customs Tariff Act, 1975. Sub-section (8) of Section 3 of the said Act even during the relevant period stipulated as under : -*

"S. 3(8) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."

It is evident from Section 3(8) of the Customs Tariff Act, 1975 quoted above that all the provisions of Customs Act, 1962 and the rules and regulations made thereunder have

been clearly borrowed into the said Section 3 to apply to the impugned CVD and so it is obvious that provisions relating to fine, penalty and interest contained in Customs Act, 1962 are expressly made applicable with regard to the impugned countervailing duty. We must, however, fairly mention that in case of Torrent Pharma Ltd. v. CCE, Surat, CESTAT set aside penalty for evasion of Anti-dumping duty, CVD and SAD (para 16 of the judgment) on the ground that penal provisions of Customs Act, 1962 had not been borrowed in the respective sections of Customs Tariff Act, 1975 under which these duties were levied, but this decision of CESTAT regarding CVD suffered from a fatal internal contraction inasmuch as CESTAT itself in para 14 of the said judgment had expressely taken note of the fact that vide Section 3(8) of the Customs Tariff Act, 1975, the provisions of Customs Act, 1962 and the rules and regulations made thereunder had been made applicable to CVD charged (under Section 3 of Customs Tariff Act, 1975). In the light of this analysis, we hold that this contention of the appellant is legally not sustainable."

Thus, the said order of Tribunal has been affirmed by the Hon'ble Supreme Court whereas Special Leave Petition in case of Mahindra & Mahindra Ltd bearing Diary No. 18824/2023 has been dismissed by Hon'ble Supreme Court holding that "No merit find in the Special Leave Petition". Whereas, the Hon'ble Supreme Court has dismissed the **Civil Appeal** filed by Oracle India Pvt. Ltd (Atul Kaushik) against the CESTAT Final Order Nos. A/52353-52355/2015-CU(DB) dated 29-7-2015.

In the case of **Workmen of Cochin Port Trust Vs. Board of Trustees of the Cochin Port Trust and Another 1978 AIR 1283**, the Hon'ble Three Judges Bench held as under:

"The effect of non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must by necessary implication be taken to have decided that it was not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order it is difficult to accept the argument that it must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award."
The dismissal of special leave petition by the Supreme Court by a non-speaking order of dismissal where no reasons were given does not constitute res judicata. All that can be said to have been decided by the Court is that it was not a fit case where special leave should be granted."

24.08 In view of the above discussion and findings, I find that differential Customs Duty of Rs. 183,10,80,587/- as demanded in Show Cause Notice is required to be demanded and recovered as determined under Section 28 (8) of the Customs Act, 1962 alongwith Interest under Section 28AA of the Customs Act. Further, as the importer has paid differential Customs Duty of Rs. 183,10,80,587/- alongwith interest of Rs. 30,30,94,754/-, the same is required to be appropriated against their Duty liability and interest accrued thereon.

24.09 I find that though the importer has paid the differential Customs Duty of Rs. 183,10,80,587/- alongwith interest of Rs. 30,30,94,754/- however, they contested that Duty and interest is not liable to be paid and relied on the decision of Hon'ble Mumbai High Court in case of Mahindra & Mahindra v. Union of India, 2022 (10) TMI 212 affirmed by the Supreme Court vide Order dated 28.07.2023. As I discussed herein above, that the importer had filed Bond at the time of importation under Advance Licence claiming benefit of Customs Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017. Further, said NotificationNo.18/2015- Custom dated 01-04-2015 also laid down that if the conditions specified in the notification are not complied with, demand and recovery of an amount equal to the duty along with interest will accrue. Thus, I find that, the

importer has filed the Bond and according to which importer has contractual obligation to pay the differential duty alongwith interest. Therefore, without prejudice to the aforesaid decision, I find that the importer is liable for payment of differential Customs Duty of Rs. 183,10,80,587/- alongwith interest. Since the importer has paid the differential duty alongwith interest, Bond filed by the importer is not required to be enforced.

25. Whether subject goods having assessable value of Rs.3662,16,11,740/- imported through Dahej Port, under the subject Advance Authorizations shall be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported availing incorrect exemption of IGST in terms of the Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, without complying with obligatory pre-import condition laid down under the said notification?

25.1 As discussed above and relying on the decision of Hon'ble Supreme Court in case of Union of India Vs. Cosmo Films Ltd reported as 2023 (72) GSTL 147 (SC) wherein Hon'ble Supreme Court has held that pre-import condition, during October,2017 to January,2019, in Advance Authorization Scheme was valid. I find that the Importer has failed to comply with the pre-import conditions as stipulated under Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017 and therefore, imported goods under Advance Authorization claiming the benefit of exemption Notification No. No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017 are liable for confiscation under Section 111(o) of the Customs Act,1962.

25.2 As the impugned goods are found liable to confiscation under Section 111 (o) of the Customs Act, 1962, I find it necessary to consider as to whether redemption fine under Section 125(1) of Customs Act, 1962 can be imposed in lieu of confiscation in respect of the imported goods, which are not physically available for confiscation. Section 125 (1) of the Customs Act, 1962 reads as under:-

> **"125 Option to pay fine in lieu of confiscation –**
>
> (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation
>
> whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit..."

25.3 I find that the importer has wrongly availed the benefit of Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017 and further imported goods have been cleared after the execution of Bond for the clearance of the imported goods under Advance Authorization. I rely on the decision in the matter of Weston Components Ltd. v. Collector reported as 2000 (115) E.L.T. 278 (S.C.) wherein Hon'ble Supreme Court has held that:

"It is contended by the learned Counsel for the appellant that redemption fine could not be imposed because the goods were no longer in the custody of the respondent-authority. It is an admitted fact that the goods were released to the appellant on an application made by it and on the appellant executing a bond. Under these circumstances if subsequently it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the customs authorities to levy redemption fine "

25.4 I further find that even in the case where goods are not physically available for confiscation, redemption fine is imposable in light of the judgment in the case of **M/s. Visteon Automotive Systems India Ltd. reported at 2018 (009) GSTL 0142 (Mad)** wherein the Hon'ble High Court of Madras has observed as under:

> *The penalty directed against the importer under Section 112 and the fine payable under Section 125 operate in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting the goods to payment of duty and other charges, the improper and irregular importation is sought to be regularised, whereas, by subjecting the goods to payment of fine under sub-section (1) of Section 125, the goods are saved from getting confiscated. Hence, the availability of the goods is not necessary for imposing the redemption fine. The opening words of Section 125, "Whenever confiscation of any goods is authorised by this Act ....", brings out the point clearly. The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act. We accordingly answer question No. (iii).*

25.5 I also find that Hon'ble High Court of Gujarat by relying on this judgment, in the case of **Synergy Fertichem Ltd. Vs. Union of India, reported in 2020 (33) G.S.T.L. 513 (Guj.),** has held that even in the absence of the physical availability of the goods or the conveyance, the authority can proceed to pass an order of confiscation and also pass an order of redemption fine in lieu of confiscation. In other words, even if the goods or the conveyance has been released under Section 129 of the Act and, later, confiscation proceedings are initiated, then even in the absence of the goods or the conveyance, the payment of redemption fine in lieu of confiscation can be passed.

25.6 In view of the above, I find that redemption fine under Section 125 (1) is liable to be imposed in lieu of confiscation of subject goods having assessable value of Rs.3662,16,11,740/-imported through Dahej Port, under the subject Advance Authorizations as detailed in Table 10 herein above.

26. Whether the importer is liable to Penalty under Section 112 (a) of the Customs Act, 1962?

26.1 I find that Hon'ble Supreme Court in the case of Cosmo Film Ltd. has held that importer was required to comply with the 'Pre-Import' conditions as mentioned in Notification No. 18/2015-Cus dated as amended vide Notification No. 79/2017- Cus dated. Thus, it is undisputed fact that importer by not complying with the condition of aforesaid Notification has rendered the goods liable for confiscation under Section 111 (o) of the Customs Act, 1962. I find that mens rea is not required in impostion of penalty under Section 112 (a) of the Customs Act, 1962. I place reliance on the decision of Hon'ble Madras High Court rendered in the case of Commissioner v. Bansal Industries reported in 2007 (207) E.L.T. 346 (Mad.) wherein it has been held as under:

"7. It is oft-repeatedly held that *mens rea* is not an essential ingredient for contravention of the provisions of a civil law. The Apex Court recently in *Chairman, SEBI* v. *Shriram Mutual Fund* [(2006) 5 SCC 361] held as under :-

"*Mens rea* is not an essential ingredient for contravention of the provisions of a civil Act. Unless the language of the statute indicates the need to establish the element of *mens rea*, it is generally sufficient to prove that a default in complying with the statute has occurred and it is wholly unnecessary to ascertain whether such a violation was intentional or not. The breach of a civil obligation which attracts a penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not."

In view of the above, I find that importer is liable for penalty under Section 112 (a) of the Customs Act, 1962 for non observance of the pre-import conditions set out in Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, which rendered the goods liable to confiscation under section 111(o) of the Customs Act, 1962.

26.2 I find that importer by relying on the decision of Mahindra & Mahindra Ltd has contended that without substantial provision under Section 3 of the Customs Tariff Act, 1975, penalty cannot be imposed. This plea is not acceptable as the penalty provisions invoked under Section 112 (a) is for contravention of the Provisions of Section 111 (o) of the Customs Act,1962. Section 112 (a) of the Customs Act, 1962 read as *"who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act,"*. Thus, I find that goods imported by the importer is liable for confiscation under Section 111 (o) of the Customs Act, 1962. Thus, as the importer failed to observe the 'pre-import' condition set out in Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, the goods imported by them is liable for confiscation and for such act and omission on the part of importer, attracts the Penalty under Section 112 (a) of the Customs Act, 1962 and once by act and omission of importer, goods are held liable for confiscation, consequently, the importer is also liable for penalty under Section 112 (a) of the Customs Act, 1962.

27. I find that importer has taken plea that Additional Director General, DRI does not have jurisdiction to issue the SCN and referred the definition of 'Proper Officer' defined in Section 2(34) of the Customs Act,1962 and submitted that person who has made assessment under Section 17 is the proper officer to issue Show Cause Notice under Section 28 of the Customs Act and stated that this proposition also finds support in the judgment of the Supreme Court in Commissioner of Customs vs. Sayed Ali & Anr., reported at 2011 (265) ELT 17(SC). I find that consequent to the decision of Hon'ble Supreme Court in case of Cannon India Pvt. Ltd. Vs. Commissioner of Customs reported in 2021(376) E.L.T. 3 (S.C.) Finance Act, 2022 has cured the so-called defects pointed out by the Hon'ble Supreme Court in Canon India Private Limited Vs. Commissioner of Customs and further, under Section 97 of the Finance Act, 2022,there is a validation of action taken or function performed before the date of commencement of Finance Act, 2022 under various Chapters of the Customs Act by any officer of Customs, as specified in Section 3 of the Customs Act,1962 as amended, where such action was in pursuance of their appointment and assigning of functions by the Central Government or the Board under the Customs Act, 1962. Therefore, I find that plea of the importer that DRI has no jurisdiction to issue Show Cause Notice is not tenable.

28. In view of foregoing discussion and findings, I pass the following order:

::ORDER::

(i) I confirm the demand of Duty of Customs amounting to Rs. 183,10,80,587/- (Rupees One Hundred Eighty Three Crore, Ten Lakh, Eighty Thousand, Five Hundred and Eighty Seven only) as detailed in Table-10 of the SCN under Section 28 (8) of the Customs Act, 1962 and order appropriation of Rs. 183,10,80,587/-already deposited against the said confirmed demand.

(ii) I order to recover the interest at appropriate rate in respect of demand confirmed at Para (i) above under Section 28AA of the Customs Act, 1962 and order to appropriate interest amounting to Rs. 30,30,94,754/- already paid as detailed in Table-10 of the SCN towards the interest liability against the confirmed demand at Para (i) above.

(iii) I hold the subject goods having assessable value Rs. 3662,16,11,740/- imported through Dahej Port under the subject Advance Authorizations as detailed in Table-10 liable for confiscation under Section 111 (o) of the Customs Act, 1962. However, as the goods are not physically available for confiscation, I impose redemption fine of Rs. 25,00,00,000/- (Rupees Twenty Five Crore only) in lieu of confiscation under Section 125 of the Customs Act, 1962.

(iv) I impose a penalty of Rs. 5,00,00,000/- (Rupees Five Crore only) on M/s. Hindalco Industries Ltd., Aditya Birla Centre, S.K. Ahire Marg, Worli, Mumbai 400030 under Section 112(a) of the Customs Act, 1962.

29. This order is issued without prejudice to any other action that may be taken under the provisions of the Customs Act, 1962 and Rules/Regulations framed thereunder or any other law for the time being in force in the Republic of India.

30. The Show Cause Notice No. DRI/KZU/CF/ENQ-108 (INT-09)/2018 dated 01.08.2019 is disposed off in above terms.

O/C

28.03.2024

(Shiv Kumar Sharma)
Principal Commissioner

DIN: 20240371MN000000C7AD

F.No. VIII/10-64/COMMR./O&A/2019 Date: 28.03.2024

M/s. Hindalco Industries Ltd.,
Aditya Birla Centre,
S.K. Ahire Marg, Worli,
Mumbai 400030

Copy to:-

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad for information please.
2. The Additional Director General, DRI, Kolkata Zonal Unit, Kolkata-700071.
3. The Deputy Commissioner of Customs House, Dahej for information please.
4. The Additional Commissioner of Customs(TRC), Ahmedabad for necessary action.
5. The Superintendent of Customs(Systems), Ahmedabad in PDF format for uploading on the Official Website of Customs, Commisionerate, Ahmedabad.
6. Guard File.